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Commission on
International
Trade Law

YEARBOOK
Volume XXVIII: 1997

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New York, 1999
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/1977
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INTRODUCTION

This is the twenty-eighth volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL).1

The present volume consists of three parts. Part one contains the Commission’s report on the work of its thirtieth session, which was held at Vienna from 12 May to 30 May 1997, 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 thirtieth session of the Commission are reproduced. These documents include reports of the Commission’s Working Groups as well as studies, reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were prepared for the Working Groups.

Part three contains the UNCITRAL Model Law on Cross-Border Insolvency, a bibliography of recent writings related to the Commission’s work, a list of documents before the thirtieth 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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1To date, the following volumes of the *Yearbook of the United Nations Commission on International Trade Law* (abbreviated herein as *Yearbook* [year]) have been published:

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Part One

REPORT OF THE COMMISSION
ON ITS ANNUAL SESSION;
COMMENTS AND ACTION THEREON
THE THIRTIETH SESSION (1997)

(Vienna, 12-30 May 1997) (A/52/17) [Original: English]

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission’s thirtieth session, held at Vienna from 12 to 30 May 1997.

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.

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its thirtieth session on 12 May 1997. 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:


5. With the exception of Botswana and Egypt, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Azerbaijan, Bangladesh, Belarus,
Bolivia, Burkina Faso, Canada, Colombia, Croatia, Cyprus, Czech Republic, Gabon, Greece, Holy See, Indonesia, Iraq, Ireland, Israel, Kuwait, Lebanon, Morocco, Netherlands, Oman, Paraguay, Peru, Republic of Korea, Romania, Sweden, Switzerland, Tajikistan, Tunisia, Turkey, Turkmenistan, Ukraine and Venezuela.

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

(a) United Nations system: World Bank; United Nations Industrial Development Organization

(b) Intergovernmental organizations: Hague Conference on Private International Law; League of Arab States; Organisation for Economic Cooperation and Development; International Bar Association; International Women’s Insolvency and Restructuring Confederation;

(c) International non-governmental organizations invited by the Commission: Cairo Regional Centre for International Commercial Arbitration; Banking Federation of the European Union; Group of Thirty; Institute of International Business Law and Practice of the International Chamber of Commerce; International Association of Insolvency Practitioners; International Association of Lawyers; International Bar Association; International Women’s Insolvency and Restructuring Confederation,

8. The Commission was appreciative of the fact that international non-governmental organizations that had expertise regarding the major items on the agenda of the current session heeded the invitation to take part in the session. Being aware that it was crucial for the quality of texts formulated by the Commission that relevant non-governmental organizations should participate in the sessions of the Commission and its working groups, the Commission requested the Secretariat to continue to invite such organizations to its sessions based on their particular qualifications.

C. Election of officers

9. The Commission elected the following officers:

Chairman: Mr. Joseph Fred Bossa (Uganda)

Vice-Chairmen: Mr. Ricardo Sandoval López (Chile) Mr. Janusz Krzyzewski (Poland) Mr. Manuel Oliviencia Ruiz (Spain)

Rapporteur: Mr. Ter Kim Cheu (Singapore)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 607th meeting, on 12 May 1997, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
5. Privately financed infrastructure projects.
9. Case law on UNCITRAL texts (CLOUT).
10. Training and assistance.
11. Status and promotion of UNCITRAL legal texts.
13. Other business.
14. Date and place of future meetings.
15. Adoption of the report of the Commission.

E. Adoption of the report

11. At its 630th and 631st meetings, on 30 May 1997, the Commission adopted the present report by consensus.

II. DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY

A. Background

12. After a preliminary discussion by the Commission in 1993 of practical problems caused by the disharmony among national laws governing cross-border insolvency, the Commission requested an in-depth study on the desirability and feasibility of uniform rules in that area of law. That discussion was suggested by the Secretariat as a result of proposals made at the UNCITRAL Congress held in 1992 under the theme “Uniform Commercial Law in the Twenty-first Century.” Prior to the decision to undertake work on cross-border insolvency, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency at Vienna from 17 to 19 April 1994, involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors,

3The election of the Chairman took place at the 607th meeting, on 12 May 1997, the election of the Vice-Chairmen at the 617th and 619th meetings, on 20 and 21 May 1997, and the election of the Rapporteur took place at the 617th meeting, on 20 May 1997. 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/2216), para. 14 (Yearbook of the United Nations Commission on International Trade Law, vol. 1: 1968-1970 (United Nations publication, Sales No. E.71.V.1), part two, sect. 1A)).


including lenders. The suggestion arising from the Colloquium was that work by the Commission should, at least at the initial stage, have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvent administrators and recognition of foreign insolvency proceedings. Subsequently, an international meeting of judges was held specifically to elicit their views on work by the Commission in that area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, held at Toronto, Canada, from 22 to 23 March 1995). The view of the participating judges and government officials was that it would be worthwhile for the Commission to provide a legislative framework for judicial cooperation, court access for foreign insolvent administrators and recognition of foreign insolvency proceedings.

13. At its twenty-eighth session, in May 1995, the Commission expressed its appreciation for the assistance provided by INSOL and considered that it would be worthwhile to prepare uniform legislative provisions on judicial cooperation in cross-border insolvencies, on court access for foreign insolvent administrators and on recognition of foreign insolvency proceedings. The task of preparing such uniform provisions was entrusted to one of the Commission’s three intergovernmental working groups, which for this project was named the Working Group on Insolvency Law.

14. The Working Group devoted four two-week sessions to the work on the project.

15. At its nineteenth and twentieth sessions, the Working Group considered the question of the form of the instrument being prepared. A number of views and arguments were considered in favour of preparing model provisions for national legislation, model provisions for an international treaty, and an international treaty. After considering the various views, the Working Group decided to continue and complete its work on the draft Model Provisions. That would not exclude the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency, if the Commission at a later stage so decided (A/ CN.9/422, paras. 14-16, and A/CN.9/433, paras. 16-20).

16. At the close of its twenty-first session, in January 1997, the Working Group noted that it would have wished to have more time available for completing its review of the draft. Yet it decided, in line with the hope expressed by the Commission at its twenty-ninth session, to submit the draft UNCITRAL Model Provisions on Cross-Border Insolvency to the Commission for consideration and completion at its thirtieth session, in 1997 (A/ CN.9/435, para. 16).

17. After the twenty-first session of the Working Group, the Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency was held from 22 to 23 March 1997 in conjunction with the 5th World Congress of the International Association of Insolvency Practitioners, held at New Orleans, United States of America, from 23 to 26 March 1997.

18. It was reported at the thirtieth session of the Commission that the Colloquium was attended by 45 judges, judicial administrators and government officials from 20 countries. The participants discussed issues of cross-border insolvency from the judicial perspective. The two dominant issues were the practice of judicial cooperation in cross-border insolvency cases and the draft Model Provisions as prepared by the Working Group.

19. Reports of a number of cases in which judicial cooperation had in fact occurred had been given by the judges involved in the cases. From those reports a number of points emerged, which might be summarized as follows: (a) communication between courts was possible, but should be done carefully and with appropriate safeguards for the protection of substantive and procedural rights of the parties; (b) communication should be done openly, with advance notice to the parties involved and in the presence of those parties, except in extreme circumstances; (c) communications that might be exchanged were various and included exchanges of formal court orders or judgements; supply of informal writings of general information, questions and observations; transmission of transcripts of court proceedings; (d) means of communication included telephone, fax, electronic mail facilities and video; and (e) where communication was necessary and was intelligently used, there could be considerable benefits for the persons involved in, and affected by, the cross-border insolvency.

20. It was further reported that even in the absence of communication between courts, the salutary goals of coordination of insolvency proceedings might still be achieved, for example, through protocols between insolvency administrators and agreements to utilize the principles contained in the Cross-Border Insolvency Concordat prepared by the International Bar Association.

21. As to the draft Model Provisions, there was general agreement that the implementation of such legislation would give useful formal foundation to the communication process developed by the courts in some countries. The Colloquium expressed recognition for the high degree of cooperation achieved within the UNCITRAL Working Group on Insolvency Law during the preparation of the draft. Participants welcomed providing the necessary legislative basis for foreign insolvency administrators to have
Draft Guide to Enactment of the UNCITRAL Model Legislative Provisions on Cross-Border Insolvency

23. The Commission considered that, in order to make the model legislative text adopted by the Commission a more effective tool for modernizing international aspects of insolvency law, it would be useful to formulate a guide designed to assist States in enacting and applying the Model Provisions. Such a guide, which should contain background and explanatory information to the Model Provisions as a whole and to individual articles, would be directed primarily to executive branches of Governments and legislators using the Model Provisions in preparing the necessary legislative revisions, but would also provide useful insight and information to other users of the text such as academics, judges and practitioners. The guide might also assist States in considering which, if any, of the provisions should be varied in order to be adapted to the particular national circumstances.

24. At the current session, the Commission had before it the draft Guide to Enactment of the UNCITRAL Model Provisions on Cross-Border Insolvency, prepared by the Secretariat (A/CN.9/436). (For the decision of the Commission on the preparation and publication of the Guide, see paragraph 220, below.)

2. Form of instrument

26. The Commission recalled the considerations by the Working Group on Insolvency Law on whether the text should be prepared as model legislation or as a treaty or model treaty (A/CN.9/422, paras. 14-16, and A/CN.9/433, paras. 16-20). The prevailing view was that the text should be completed as model legislation, the form that, because of its flexibility, was best suited to induce in the shortest possible time harmonization of national laws in the area of cross-border insolvency, an area of law that hitherto had not been subject to unification. However, the view was also expressed that a legislative text on international judicial cooperation required a high degree of uniformity and had to include the requirement of reciprocity, which could only be achieved by an international treaty and not by model legislation, from which the States could deviate when enacting it. On that basis, a suggestion was made that, after completing the work on the draft Model Provisions, the Commission should consider the desirability and feasibility of preparing model treaty provisions or a draft treaty on judicial cooperation in cross-border insolvency. (The deliberations of the Commission on that suggestion are reflected in paragraphs 223 and 224, below.)

3. Consideration of draft articles

27. The Commission took as the basis of its considerations the draft UNCITRAL Model Provisions on Cross-Border Insolvency as contained in the annex to document A/CN.9/435. The considerations commenced with draft article 14, because it was thought that finalizing articles 14 to 17 (recognition of foreign proceedings and consequences of recognition) would facilitate agreement on other provisions.

28. A drafting group was established by the Commission with the task of implementing the Commission’s decisions, reviewing the drafting aspects of the text as a whole, and ensuring concordance among the six language versions of the text.

Article 14. Grounds for refusing recognition

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

"[Subject to article 6,] recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(d); or

(b) . . . . . . . . . . . . . ."

**"Subparagraph (b) would be the appropriate location for including any additional ground for refusing to recognize a foreign proceeding, should the Commission so decide."

30. It was suggested to add to the current wording of draft article 14 the following two subparagraphs: "(b) the application is not made before [a] [the] Court having
competence pursuant to article 4"; and "(c) the application
does not satisfy the requirements provided for in article
13". It was said that the purpose of the article, as supple­mented by the suggested subparagraphs, was to indicate
that, if recognition was not contrary to the public policy of
the enacting State, if the application was submitted to the
competent court and if the application met the requirements
set out in article 13, the court was obligated to grant rec­ognition.

31. While general agreement was expressed with the sub­stance of the suggestion, the proposed subparagraph (b)
was criticized because it interfered with the procedures
governing cases where the court received an application
but was not competent to deal with it. Under those proce­dures the court might, for example, be directed to transmit
the application to the competent court or to give the party
the opportunity to correct the mistake. The Commission
agreed with the criticism and, in order to express more
clearly the purpose of articles 13 and 14, which was to
establish a system of quasi-automatic recognition where the
conditions established by the Model Provisions were met,
decided that article 14 should read along the following
lines, subject to review by the drafting group:

"Subject to article 6, a foreign proceeding shall be
recognized if the foreign representative applying for
recognition has been appointed within the meaning of
article 2(d), if the foreign proceeding is a proceeding
within the meaning of article 2(a), if the application
meets the requirements of article 13(2) and (7), and if
the application has been submitted to the court referred
to in article 4."

32. A suggestion was made that public policy should
only appear in article 14 (as a ground for refusal of recog­
nition) and not as a general reservation applicable to other
actions that might be taken under the Model Provisions. It
was said that it was not appropriate to subject to the reser­vation of public policy, for example, access by the foreign
representative to courts of the enacting State, which was
not conditioned on recognition of the foreign proceeding.
The Commission, however, considered that article 6 should
provide a general public policy reservation for any action
governed by the Model Provisions. It was agreed that the
concept of public policy in articles 6 and 14 should be the
same. As to the exact formulation of the concept, the deci­sion was postponed until the consideration of article 6 (see
paragraphs 170-173, below).

33. In the context of the discussion of article 14, a pro­posal was made to include a new paragraph in article 14
providing that recognition of a foreign proceeding should
be granted only to such limited effects as were consistent
with the purposes of ensuring coordination of proceedings
under the provisions (yet to be formulated) on coordina­tion between a pending main proceeding in the enacting State
and a subsequent application for recognition of a foreign
main or non-main proceeding. The Commission postponed
the consideration of that matter to a later time, when it
would consider provisions on concurrent proceedings (see
paragraphs 106-110, below).

Article 15. Relief upon application for recognition
of a foreign proceeding

34. The text of draft article 15, as considered by the
Commission, was as follows:

"(1) From the time of filing an application for recog­
nition until the application is decided upon, the court
may, at the request of the foreign representative, where
necessary to protect the assets of the debtor or the inter­ests of the creditors, grant any relief mentioned in article
17.

"(2) [Insert provisions (or refer to provisions in force
in the enacting State) relating to notice].

"(3) Unless extended under article 17(1)(c), the relief
granted under this article terminates when the applica­tion for recognition is decided upon.

"(4) The court may refuse to grant relief under this
article if such relief would interfere with the administra­tion of a foreign main proceeding."

General remarks

35. It was noted that article 15 dealt with relief that might
be granted by the competent court in the enacting State,
upon request by a foreign representative, prior to recogni­tion of the foreign proceeding. Such relief was discretion­ary and, as such, did not flow automatically from an appli­cation by the foreign representative.

Paragraph (1)

36. The Working Group considered at length the ques­tion whether the court should be empowered to grant in the
hypothesis of article 15 any relief mentioned in article 17
or whether the relief available prior to recognition should
have a more limited scope.

37. It was noted that article 15(1) authorized the compe­tent court to grant types of relief which were typically
available under collective insolvency proceedings (e.g.
staying the commencement or continuation of individual
actions or individual proceedings under article 17(1)(a) or
entrusting the administration and realization of all or part
of the debtor's assets located in the enacting State to the
foreign representative or another person designated by the
court under article 17(1)(e)). It was pointed out that in
some jurisdictions the relief that could be granted by the
court before the opening of insolvency proceedings or be­fore recognition of a foreign proceeding was limited to
relief measures of an individual nature provided under
national rules on civil procedure (i.e. measures covering
specific assets identified by a creditor) and did not extend
to special relief measures available under special rules con­cerning collective insolvency proceedings. The view was
expressed that some of those jurisdictions would have diffi­culties to implement article 15 as currently drafted, as it
gave the court a latitude of discretion that was not customary
in those jurisdictions. It was suggested that, with a view
to stressing that the relief available before recognition was
only of an individual nature, it was suggested that paragra­ph (1) could be redrafted as follows:
“From the time of filing an application for recognition until the application is decided upon, the court referred to in article 4 may, at the request of the foreign representative, grant such provisional relief for the purposes of protecting the assets of the debtor or the interests of the creditor as could be granted under any law of this State other than this Law to an individual creditor seeking to avoid irreparable harm to a prima facie enforceable claim for an amount equal to the amount of the debtor’s liabilities, as actually known or reasonably estimated under the foreign proceeding.”

Alternatively, it was suggested that a provision along the lines of the above proposal should be included in the Model Provisions, either in the text or as a footnote, as an option for legislators.

38. Various interventions were made in favour of defining the circumstances under which the court would grant relief under article 15(1) as well as the scope of such relief as distinct from the relief provided in article 17(1). A widely shared view was that a “block” reference in paragraph (1) to the relief mentioned in article 17(1) was either too wide or did not provide sufficient guidance to the court in the exercise of its discretion under article 15. At the same time, however, the widely prevailing view was that, in revising paragraph (1), the Commission should not limit the relief available before recognition only to relief measures of an individual nature provided under national rules on civil procedure.

39. It was noted that the purpose of provisional relief under article 15 was, inter alia, to ensure the preservation of the assets of the debtor and the rescue of financially troubled enterprises. An exclusion of collective relief measures, such as the ones mentioned in article 17(1)(a) and (e), might frustrate those objectives, for instance in cases where only relief of such a nature would be capable of preventing the dissipation or deterioration of the debtor’s assets. Furthermore, it was noted that the difficulty of granting collective relief prior to recognition of a foreign proceeding was not a problem that occurred in most jurisdictions. In a number of jurisdictions that did not ordinarily provide for collective types of relief prior to the opening of insolvency proceedings, there would be no fundamental obstacle to granting such type of provisional relief where proceedings had been opened in a foreign jurisdiction and an application for the recognition of such proceedings had been submitted to the local court. It was widely felt that the scope of paragraph (1) would be seriously weakened if that provision were to include more restrictive options formulated to address specific difficulties of particular jurisdictions.

40. Having agreed on the need for retaining the power of the court to grant provisional relief under article 15, including relief of a collective nature, while at the same time distinguishing between relief available prior to recognition and the relief available under article 17(1), the Commission proceeded to consider the circumstances under which the court would grant relief under article 15(1) as well as the scope of such relief.

41. With a view to clarifying the nature of the relief provided under article 15 and the circumstances under which it was to be granted, the Commission agreed that such relief should be expressly qualified as “provisional” and that it should only be available where urgently needed for the purpose of protecting the assets of the debtor or the interests of the creditors. The drafting group was requested to redraft paragraph (1) accordingly.

42. It was suggested that the stay of the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities mentioned in article 17(1)(a) was a far-reaching measure which would not be entirely appropriate within the context of article 15. At that early juncture, before the decision on recognition, there was no impending need for suspending the continuation of actions already pending against the debtor or for staying the commencement of new actions. It was proposed that, as a provisional measure, it should be sufficient to stay measures of execution against the debtor’s assets, a solution which was found in a number of jurisdictions. The Commission accepted that proposal and requested the drafting group to provide appropriate language to that effect. It was agreed that the Guide to Enactment should indicate that, in the context of article 15, the term “execution” should be interpreted broadly.

43. The question was asked whether the reference to article 17(1)(d) in article 15(1) implied an unlimited power to search for potentially relevant evidence or to conduct a kind of “pre-trial discovery”, a procedure which was known in some legal systems, but which would cause considerable difficulties in a number of jurisdictions. In that connection, it was suggested that, prior to recognition, the relief should essentially aim at securing and gaining control over the debtor’s books, records and documents, and that subparagraph (d) of article 17(1) should be adjusted to meet the more limited needs of the provisional relief under article 15(1). In response to that suggestion it was observed that the need for obtaining information and securing evidence on the debtor’s affairs might not be limited to securing and gaining control over the debtor’s books, records and documents and that other types of evidence and information should not be excluded. Another suggestion was expressly to provide that relief of the type mentioned in article 17(1)(d) that was granted under article 15(1) was subject to the requirements and limitations of the procedural laws of the enacting State. The prevailing view, however, was that the relief mentioned in article 17(1)(d), which concerned specific points of evidence, was also necessary as provisional relief. In granting such relief under article 15(1), the court would be guided by its own rules on procedure on the taking of evidence and would not introduce discovery mechanisms unknown in the enacting State. Therefore, an express reference to limitations or requirements of national law was unnecessary. Having considered the various views expressed, the Commission agreed that the court of the enacting State should be given the discretion, under article 15(1), to grant the relief mentioned in article 17(1)(d) without specific restrictions.

44. With regard to the reference to subparagraph (e) of article 17(1), it was observed in various interventions that entrusting the administration or realization of debtor’s assets to the foreign representative might not always be warranted before the decision on recognition of the foreign
proceeding. The administration of the debtor’s assets and in particular their realization might represent irreversible measures which would not be compatible with the provisional nature of the relief under article 15(1). It was proposed that, within the context of article 15(1), the powers of the foreign representative or other person designated by the court should be limited to measures destined to preserve three categories of assets: perishable assets, assets susceptible of devaluation and assets otherwise in jeopardy, such as where there was an imminent danger of their being concealed or dissipated. While some concerns were voiced as to the appropriateness of including the last category of assets, which was considered to be insufficiently defined, it was decided that administration or realization measures under article 15(1) should also encompass measures taken to preserve assets found to be in jeopardy. The drafting group was requested to formulate appropriate language to that effect.

45. Subject to the amendments mentioned above, the Commission approved the substance of paragraph (1).

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

46. The Commission approved the substance of paragraphs (2) and (3) and reserved its decision on paragraph (4) until it had considered article 22 concerning concurrent proceedings (see paragraphs 94-116, below).

Article 16. Effects of recognition of a foreign main proceeding

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

“(1) Upon recognition of a foreign main proceeding, "

(a) the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities are stayed;

(b) the right to transfer, dispose of or encumber any assets of the debtor are suspended.

(2) The scope of the stay and suspension referred to in paragraph (1) of this article is subject to [refer to any exceptions or limitations that are applicable under laws of the enacting State relating to insolvency].

(3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings, to the extent this is necessary to preserve a claim against the debtor.

(4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under [identify laws of the enacting State relating to insolvency] or the right to file claims in such a proceeding.

(5) This article does not apply if, at the time of application for recognition, a proceeding is pending concerning the debtor under [identify laws of the enacting State relating to insolvency]."

48. The Commission noted that, while relief under draft articles 15 and 17 was subject to the discretion of the court, the effects provided by draft article 16(1) were not, i.e. they either flowed automatically from recognition of the foreign main proceeding or, where an appropriate court order was needed for those effects to become operative, as was true in some legal systems, the court had to issue the order. Notwithstanding the “automatic” or “mandatory” nature of the effects under article 16, their scope depended on exceptions or limitations that might exist in the law of the enacting State (e.g. as regards the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, initiation of court actions for claims that arose after the commencement of the insolvency proceeding (or after recognition of a foreign main proceeding), or completion of open financial-market transactions). Another difference between relief under draft articles 15 and 17 and the effects under draft article 16 was that the relief under draft articles 15 and 17 might be issued in favour of main as well as non-main proceedings, while the effects of draft article 16 applied only to main proceedings.

Paragraphs (1) and (2)

49. The view was expressed that in some jurisdictions the broad and far-reaching effects envisaged in article 16(1) could only be granted under stringent requirements to be verified by the competent court. In those jurisdictions, the courts might, for example, require proof of imminent danger to the assets of the debtor that would result from the continuation of individual actions or from the transfer or disposal of the assets. It was stressed that requirements for triggering the effects such as those envisaged in article 16(1) were stringent because those effects carried with it a “social stigma” associated with bankruptcy. Those requirements, it was said, would need to be observed also in the hypothesis of article 16, so as to avoid giving rise in the enacting State to the far-reaching and socially weighty consequences of foreign insolvency proceedings that might have been opened under less stringent requirements than the requirements applicable in the enacting State. As a result of that concern, it was suggested to provide in paragraph (2) that “The requirements of the stay and suspension” should be subject to local law and not, as the current draft was worded, that “The scope of the stay and suspension” was subject to local law.

50. In response it was said that the automatic consequences envisaged in article 16(1) were necessary to allow taking steps for organizing an orderly, coordinated and fair cross-border insolvency proceeding. In order to achieve those benefits, it was justified to impose on the insolvent debtor the possibly harsher consequences of insolvency proceedings in the country where it maintained a limited business presence, even if the country where the centre of the debtor’s main interests was situated posed less stringent conditions for the opening of insolvency proceedings. Thus, the effects of recognition in the enacting State of foreign main proceedings should not be subject to possibly difficult evidentiary requirements applicable to a request for opening insolvency proceedings in the enacting State. Besides, sufficient safeguards had been incorporated in the draft Model Provisions, notably article 19(3), to protect the interests of interested parties, including the debtor. After discussion, the Commission confirmed the concept of the
current draft article 16(1) and (2) and decided to keep the words “The scope of the stay and suspension . . .” in paragraph (2).

51. The view was expressed that the automatic effects under article 16 of the recognition of a foreign main proceeding should be expressly limited (e.g. by providing a time period after which they would lapse) or in another way made dependent on the continued existence of the foreign main proceeding. That view was not adopted since existing provisions, in particular article 19(3), provided sufficient protection against consequences in the enacting State that should be terminated or modified as a result of changes in the foreign main proceeding. (The deliberations of the Commission concerning article 19(3) are reflected in paragraphs 86-93, below.)

52. A suggestion was made that the article should express that the effects in the country of recognition should not go beyond the effects of the proceeding in the country of origin; in particular, it was said, it was necessary to avoid giving in the country of recognition a more favourable treatment to the foreign representative than he or she would enjoy in the country where the main proceeding was opened. That view was not adopted by the Commission, first, on the practical ground that it was not reasonable to require the court in the enacting State to engage in a possibly complex analysis of the foreign law to determine which effects were to be given in the enacting State to the foreign proceeding and, secondly, because recognition, as conceived by the Model Provisions, implied granting effects that were necessary for a coordinated conduct of a cross-border insolvency rather than importing the consequences of the foreign law into the enacting State.

53. The Commission discussed whether recognition of a foreign “interim proceeding” created a risk of extending automatic effects of article 16 to a proceeding that had an insufficient or provisional basis (definition of foreign interim proceedings was covered by the article by virtue of the definition of “foreign proceeding” in article 2(a), which covered also “an interim proceeding”). It was pointed out that, under the law of many countries, insolvency proceedings would often be commenced and conducted on an “interim” or “provisional” basis and that, except for the interim nature of the proceedings, such proceedings, in order to be recognized, had to be continuously subject to the supervision of the foreign court and had to meet all the other requisites of the definition in article 2(a). Therefore, it was argued, “interim proceedings” should not be distinguished from other insolvency proceedings for the purposes of recognition. It was indicated that, should there be a doubt in the enacting State as to whether a foreign “interim proceeding” had a sufficient basis for the automatic effects of draft article 16, any affected person could seek termination of the stay under draft article 19(3). (The deliberations of the Commission concerning article 19(3) are reflected in paragraphs 86-93, below.) The Commission found those arguments convincing and decided that the provisions of draft article 16 should apply also to “interim” foreign proceedings.

54. A concern was expressed that recognition of a foreign main proceeding, while appropriately resulting in a stay of judicial proceedings, should not stay arbitral proceedings. It was stated that, as a matter of principle, an automatic stay of arbitral proceedings might unduly interfere with the freedom of contract of the parties who had agreed to submit a dispute to arbitration. Furthermore, in practical terms, it might be difficult to implement the automatic stay in the case of an arbitration that took place neither in the enacting State nor in the State where the main proceeding was conducted. It was stated in response that applying the automatic effects of article 16 was not incompatible with the principles governing arbitration, since national laws contained different types of limitations to the effectiveness of arbitration agreements, and the temporary stay provided in article 16 was one of them. Furthermore, the wording in square brackets in draft article 19(3) offered sufficient flexibility for the court in the enacting State to terminate the stay under draft article 16, taking into account the interest of the parties. The Commission also noted that a stay under the Model Provisions would not contravene obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

55. It was understood in the Commission that the “stay of individual actions or individual proceedings” also meant that any execution of a decision was stayed. Noting that understanding, a proposal was made for restricting paragraph (1)(a) so that individual proceedings would be able to continue but that the execution of any decision emanating from those proceedings would be stayed. The Commission, however, decided that the automatic stay should cover not only execution of claims but also the individual actions and proceedings conducted prior to execution; that was considered necessary to allow the foreign representative the necessary temporary respite to organize the affairs of the debtor without having to participate in possibly numerous actions against the debtor. It was added that the wording in square brackets in draft article 19(3) offered the possibility for the court to modify the stay under draft article 16, taking into account the circumstances of the case (however, see paragraph 88, below). The Commission decided that paragraph (1) should expressly state that the stay of individual actions and proceedings covered also “execution against the debtor’s assets”, similarly as was decided with respect to article 15(1).

Paragraph (3)

56. It was observed that the draft Model Provisions did not address the question whether the running of the limitation period for a claim was interrupted when the claimant was unable to commence individual proceedings as a result of article 15(1)(a). Since it was not feasible to introduce a harmonized rule on that question, and since it was necessary to protect creditors from losing their claims because of a stay pursuant to article 16(1)(a), paragraph (3) had been added to authorize the commencement of individual actions to the extent that it was necessary to preserve claims against the debtor.

57. A view was expressed that paragraph (3) was superfluous and potentially confusing in a State where a demand
of payment or performance served by the creditor on the debtor had the effect of interrupting the limitation period. In response it was stated that also in such a State paragraph (3) would still be useful, first, because the question of the interruption of the limitation period might, as a result of conflict-of-laws rules, be governed by the law of a State in which the opening of insolvency proceeding did not interrupt the running of the limitation period and, secondly, as assurance to foreign claimants that their claims would not be prejudiced in the enacting State.

Paragraph (4)

58. The Commission found the substance of paragraph (4) acceptable.

Paragraph (5)

59. The Commission postponed its consideration of paragraph (5) until its consideration of draft article 22 (see paragraphs 106-110, below).

Conclusion

60. Subject to the above decisions, the Commission approved the substance of article 16 and referred it to the drafting group to review its language and implement those decisions.

Article 17. Relief that may be granted upon recognition of a foreign proceeding

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

"(1) Upon recognition of a foreign main or non-main proceeding, the court may, at the request of the foreign representative, grant any appropriate relief including:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 16(1)(a);

(b) suspending the right to transfer, dispose of or encumber any assets of the debtor to the extent they have not been suspended under article 16(1)(b);

(c) extending relief granted under article 15;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration and realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) granting any additional relief that may be available to [insert the title of a person or body administering a liquidation or reorganization under the law of the enacting State] under the laws of this State.

"(2) Upon recognition of a foreign main or non-main proceeding, the court may entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

"(3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding."

General remarks

62. It was noted that, unlike article 16, which dealt with mandatory effects of the recognition of a foreign main proceeding, article 17 concerned relief that might be granted by the competent court in the enacting State at its discretion, following recognition of the foreign proceeding. Such relief was available to representatives appointed in both main and non-main proceedings.

63. General support was expressed to the need for a provision such as article 17 in the interest of an efficient administration of cross-border insolvencies and the protection of the debtor's assets and the interests of creditors.

Paragraph (1)

64. In the light of the deliberation of the Commission concerning article 15(1), it was agreed that subparagraph (a) should expressly mention the stay of execution against the debtor's assets. It was also agreed that the expression "entrusting the administration and realization" in subparagraph (e) should instead read "entrusting the administration or realization".

65. A suggestion was made to mention the authority of the court to make on-site inspections among the evidentiary measures that could be taken pursuant to subparagraph (d). It was also suggested that subparagraph (d) should expressly state that all the measures mentioned therein were subject to the requirements and procedures provided under local law. Those suggestions did not attract sufficient support and were not adopted.

66. The Commission generally approved the substance of paragraph (1) and referred it to the drafting group.

Paragraph (2)

67. The question was asked whether the measure envisaged in paragraph (2) could be granted by the court ex officio or whether it required an application by the interested party. In response it was noted that distribution of assets was an important measure that directly affected the interests of the creditors and that was usually initiated by the representative in an insolvency proceeding. It was further observed that the recognition of the foreign proceeding
only gave the foreign representative the right to apply for relief and did not generate any automatic effect in addition to the mandatory effects provided in article 16. Therefore, the relief provided in paragraph (2) was to be granted upon request by the foreign representative.

68. The Commission approved the substance of paragraph (1) and referred it to the drafting group.

Paragraph (3)

69. Various interventions were made enquiring about the meaning of the phrase “assets falling under the authority of the foreign representative”, which was found to be unclear. It was suggested that, when read in conjunction with paragraph (2), paragraph (3) could be construed to the effect that the court of the enacting State that recognized a foreign non-main proceeding would be bound to recognize also the foreign representative’s authority over the debtor’s assets in respect of which he or she claimed to have authority. The view was expressed that such a result would be inconsistent with the proposition, reflected in paragraph (1) of article 16, that there should be no mandatory effects for foreign non-main proceedings.

70. The Commission considered various proposals to clarify the meaning of paragraph (3). One proposal was to make reference in paragraph (3) to assets that were originally located in the State where the foreign proceeding had been opened and which had been improperly transferred abroad. That proposal was found to be too restrictive, as the foreign representative might, for instance, have a legitimate claim to administer assets originally located in the enacting State or which were lawfully transferred thereto. Another suggestion was that the reference to assets under the foreign representative’s authority should be replaced with a reference to assets subject to control or supervision by a foreign court. In response to that suggestion, it was observed that the proposed formulation, while appropriate for the definition of foreign proceedings in article 2(a), was inadequate for qualifying the assets to which article 17(3) related. Depending on the type and nature of the insolvency proceeding, the debtor’s assets might not always be under the actual “control or supervision” of the foreign court. Yet another proposal was to use language such as “assets which the foreign representative had been entrusted to administer”. Objections were also raised to that suggestion which would require an assessment of the powers given to the foreign representative in the foreign proceeding under the laws applicable to that foreign proceeding.

71. It was pointed out that, in the context of the Model Provisions, the effects of the recognition of a foreign non-main proceeding were limited. In that connection, it was stated that a formulation which referred to the authority or powers of the administrator under the foreign non-main proceeding, or which referred to the supervision of the court over assets in the foreign non-main proceeding, might represent an importation of the effects of the foreign proceeding. That result would not be compatible with the limited purpose of recognition of the foreign proceeding under the Model Provisions.

72. After considering the various views expressed, it was generally felt that paragraph (3) should be redrafted for the purpose of empowering the court of the enacting State to determine, in the light of its own laws, which of the assets located in the territory of the enacting State should be administered in the foreign proceeding.

73. Subject to those decisions, the Commission approved the substance of paragraph (3) and referred it to the drafting group.

Article 18. Notice of recognition and relief granted upon recognition

74. The text of article 18, as considered by the Commission, was as follows:

“Notice of recognition of a foreign proceeding [and of the effects of recognition of a foreign main proceeding under article 16] shall be given in accordance with [the procedural rules governing notice of the commencement of a proceeding under the insolvency laws of this State].”

75. It was observed that the notice requirement, provided in the interest of local creditors and other interested local persons, did not describe in detail the kind of information to be contained in the notice. If the court of the enacting State considered that particular information should be included in the notice (e.g. details about the stay and suspension pursuant to article 16 or the relief granted under article 17), the court might give an appropriate order to the foreign representative, as a condition for granting relief, pursuant to article 19(2). It was noted that, in the deliberations that led to the adoption of draft article 18, it had been understood in the Working Group that the mandatory effects of the recognition would be immediately operative and should not await the provision of notice to creditors and other interested parties under article 18. It had also been the understanding of the Working Group that article 18 concerned only notice of recognition, and not notice of relief granted by the court under article 17, a matter which was entirely left to the procedural rules of the enacting State.

76. The view was expressed that the scope of the notice requirements provided in article 18, which was limited to the recognition of the foreign proceeding, and possibly to the mandatory effects of the recognition, was too narrow. It was suggested that article 18 should also provide guidance to the court as to the content of the notice, for instance by requiring that the notice should specify in detail the effects of the recognition under article 16 in an attempt to establish uniform notice requirements.

77. In response to that suggestion, it was pointed out that national laws varied greatly as to the form, time and purposes of notices that were required to be given in insolvency cases or for the purpose of recognizing foreign proceedings, and that it would not be realistic to attempt to achieve uniformity in that field. It was also noted that the issuance of notices under article 18 might entail additional costs which might not always be warranted by the assets available for the insolvency proceedings. The Commission was urged not to introduce provisions that would
78. Differing views were expressed as to whether article 18 should also require the court to issue notice of an application for recognition. Pursuant to various interventions, the lack of a reference to such notice in article 18 might be construed to the effect that the court was obligated to grant recognition without hearing the debtor or other interested persons, such as local creditors. That situation would raise legal objections in a number of jurisdictions where, due to fundamental principles of due process, in some cases enshrined in constitutional provisions, a decision of the importance of the recognition of a foreign insolvency proceeding could only be made after hearing the affected parties. Also, in view of the fact that not all jurisdictions had legislation on recognition of foreign proceedings, it was important to expressly mention notice of application in article 18 so as to clarify that the hypothesis of that provision was not excluded from the application of general principles on notice requirements.

79. However, strong objections were raised to including a generally applicable duty to issue notice of application for recognition in article 18. It was pointed out that applications for recognition of foreign proceedings required expeditious treatment, as they were often submitted in circumstances of imminent danger of dissipation or concealment of the debtor’s assets or serious aggravation of the debtor’s financial situation. For that reason, a number of jurisdictions did not require the issuance of notice prior to any court decision on an application for recognition. Imposing that requirement in article 18 would cause undue delay and would be inconsistent with article 13(8), which provided that an application for recognition of a foreign proceeding should be decided upon at the earliest possible time.

80. Furthermore, it was pointed out that the notice of recognition under article 18 was in fact a publicity requirement, so as to apprise potentially interested persons, such as local creditors, that a foreign proceeding had been recognized in the enacting State. That notice was different from, and should not be confused with, individual notifications that the court of the enacting State, under its own procedural rules, had to issue to persons that would already be applied in most jurisdictions, namely, that in issuing orders or granting relief measures, a court had to bear in mind the interests of those persons who might be affected by the order or measure and might subject those measures to conditions. In order to link articles 15 and 17 in a clearer way to those principles, it was proposed to replace paragraphs (1) and (2) with the following provision:

 Paragraphs (1) and (2)

81. In the course of the discussion, it was increasingly felt that, since notice requirements varied greatly under national laws, the Commission should avoid attempting to achieve uniformity in that field. After consideration of the various views expressed, it was agreed that article 18 might lead to difficulties of interpretation and that any notice requirements concerning the recognition should be left to the laws of the enacting State. Accordingly, the Commission decided to delete article 18. The Guide to Enactment should clarify that notice requirements under national law were not affected by the Model Provisions.

Article 19. Protection of creditors and other interested persons

82. The text of the article, as considered by the Commission, was as follows:

“(1) In granting or denying relief under article 15 or 17, and in modifying or terminating relief under this article, the court shall take into account the interests of the creditors and other interested persons, including the debtor [must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected].

“(2) The court may subject such relief to conditions it considers appropriate.

“(3) Upon request of a person or entity affected by relief granted under article 15 or 17, or by the stay or suspension pursuant to article 16(1), the court may modify or terminate such relief [stay or suspension], taking into account the interests of the creditors and other interested persons, including the debtor].”

83. The view was expressed that, as currently drafted, paragraphs (1) and (2) merely restated a general principle that would already be applied in most jurisdictions, namely, that in issuing orders or granting relief measures, a court had to bear in mind the interests of those persons who might be affected by the order or measure and might subject those measures to conditions. In order to link articles 15 and 17 in a clearer way to those principles, it was proposed to replace paragraphs (1) and (2) with the following provision:

“Nothing in this law shall limit the authority of the court to reject, modify, subject to conditions or terminate any relief measure granted under articles 15 or 17 of this law pursuant to, or in conformity with, any other law of this State.”

84. The prevailing view, however, was that paragraphs (1) and (2) established a useful framework for the court to exercise its powers under articles 15 and 17 and should be retained. The reference to the interests of creditors, the debtor and other interested parties in paragraph (1) was found to provide concrete elements to guide the court in assessing the impact of relief measures requested to be granted under article 15 or 17. The Commission decided to retain the formulation “must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected”.

unreasonably burden the proceedings. Pursuant to that view, not only should article 18 not be expanded, but it should also be amended for the purpose of authorizing the court to dispense with the notice of recognition when the assets available did not warrant the cost of issuing such notice.
85. It was proposed to amend paragraph (1) for the purpose of expressly mentioning the protection of the interests of local creditors. The prevailing view, however, was largely that the purpose of article 19 was not to be limited to the protection of local creditors. Besides, an express reference to local creditors in paragraph (1) would require a definition of local creditors, which would be difficult to formulate. Therefore, the proposal was not adopted.

Paragraph (3)

86. Objections were raised with regard to the possibility that the court of the enacting State might modify or terminate the mandatory effects of the recognition of a foreign main proceeding under article 16. It was stated that, to the extent the provision allowed the court to set aside the application of a statutory rule of law, paragraph (3) gave the court a power that was not given to the courts in some legal systems. Such a provision was found to be appropriate only in respect of discretionary relief granted under articles 15 and 17. General or ad hoc exceptions to article 16 should be dealt with within the context of that article. Therefore, it was suggested that the reference to article 16(1) in paragraph (3) should be deleted. Alternatively, if such reference were to be retained, the Commission should amend paragraph (3) to provide specific grounds on which the court could modify or terminate the mandatory effects of recognition under article 16(1). Concerns were expressed that, in the absence of such grounds, some jurisdictions might feel compelled to establish them unilaterally, thus endangering the uniformity that the Model Provisions attempted to achieve.

87. In response it was said that paragraph (2) was intended to provide persons that might be adversely affected by the stay or the suspension under article 16(1) with an opportunity to be heard by the court of the enacting State. Such a safeguard was needed in the Model Provisions, so as to enable the court of the enacting State to deal with hardship situations, particularly in jurisdictions where no rule similar to article 16(1) was in place. Furthermore, in some legal systems where the opening of insolvency proceedings produced the effects listed in article 16(1), the courts were authorized to make individual exceptions upon request by the interested parties, under conditions prescribed by local law.

88. However, in view of the strong objections that had been raised to the current wording of paragraph (3), the Commission considered various proposals to amend paragraph (3) so as to take into account the difficulties that some jurisdictions might experience in the application of that provision as currently drafted. Wide support was expressed to the proposition that paragraph (3) should be limited to modification or termination of relief granted under articles 15 and 17 and that article 16(2) should be amended to provide that the modification or termination of the stay and the suspension provided in article 16(1) was subject to the laws of the enacting State.

89. It was considered that the absence of a reference in paragraph (3) to the power of the court to modify or terminate relief ex officio might create the impression that the courts did not have that power. After discussion, it was agreed that paragraph (3) should also refer to the court’s power to modify or terminate relief granted under articles 15 and 17 on its own motion.

90. The Commission noted that, in most cases, relief under articles 15 and 17 would be granted upon request by the foreign representative. However, doubts might arise as to whether the foreign representative could be regarded as being “a person or entity affected by relief granted under article 15 or 17” for the purposes of paragraph (3). In that connection, it was suggested that the foreign representative might, in the interest of the creditors, have a legitimate interest in requesting the modification or termination of relief measures granted under articles 15 and 17. Paragraph (3) should expressly cover such a possibility. The Commission agreed with that proposal and decided to include reference to the foreign representative in paragraph (3).

91. The Commission further considered the question whether paragraph (3) should also refer to the possibility of modification of the court’s decision to recognize the foreign proceeding. In support of such a possibility it was stated that the recognition of the foreign proceeding should not be regarded as perennial. The circumstances under which the foreign proceeding was recognized might change, for instance, if the foreign proceeding itself terminated or its nature was changed. Also, new facts might arise which required or justified a change of the court’s decision, for instance, if the foreign representative disregarded the terms of the relief under article 17 or committed unlawful acts to the detriment of creditors or other interested parties in the enacting State. Paragraph (3) should empower the court to revisit the decision to recognize the foreign proceeding if the circumstances so required.

92. In response it was pointed out that the decision to recognize a foreign proceeding, as any other decision by the court of the enacting State, would usually be subject to appeal and to other procedures available in the enacting State, under its own procedural rules, for the purpose of revising judicial decisions and judgments. That was not, however, a matter that could be appropriately dealt with within the scope of paragraph (3). After consideration of the different views expressed, it was generally felt that the question of modification or revision of the recognition of the foreign proceeding essentially involved issues of appeal and rescission of judicial decisions which were outside the scope of the Model Provisions. It was decided that the Guide to Enactment should contain an explanation to that effect within the context of article 13, which dealt with the recognition of the foreign proceeding. It was pointed out, in that connection, that some appeal procedures under national laws gave the appeal court the authority to review the merits of the case in its entirety, including factual aspects. It was suggested that the Guide to Enactment should indicate that it would be consistent with the Model Provisions if an appeal of the decision under article 13 would be limited to the question of whether the requirements of articles 13 and 14 had been met by the decision to recognize the foreign proceeding. (However, in its subsequent deliberations on article 13, which are reflected below in paragraphs 199-209 and in particular in paragraph 207, the Commission decided to amend article 13 so as to provide that...
nothing in that article prevented the modification or termination of recognition under circumstances specified therein.)

93. Subject to the changes mentioned above, the Commission approved the substance of paragraph (3) and referred it to the drafting group.

Article 22. Concurrent proceedings

94. The text of the article, as considered by the Commission, was as follows:

"(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to commence a proceeding in this State against the debtor under [identify laws of the enacting State relating to insolvency] only if the debtor has assets in this State, and the effects of that proceeding shall be restricted to the assets of the debtor situated in the territory of this State.

"(2) Recognition of a foreign insolvency proceeding is, for the purposes of commencing a proceeding in this State referred to in paragraph (1) of this article and in the absence of evidence to the contrary, proof that the debtor is insolvent."

Paragraph (1)

95. The Commission considered that the reference in paragraph (1) to a limitation of the jurisdiction of the courts of the enacting State to commence a proceeding against the debtor might lead to difficulties of interpretation, particularly as it implied that the courts commenced the proceedings on their own motion. It was therefore agreed that it would be preferable to use language along the lines "a proceeding may be commenced... ."

96. The view was expressed that paragraph (1) was inadequate to achieve the purpose for which it had been formulated, namely, to limit the possibility of opening local proceedings after recognition of a foreign main proceeding, since under paragraph (1) the mere presence of assets in a State would be sufficient for the opening of local proceedings. It was thus suggested that the words "an establishment" should be added before the word "assets", and that both words should be placed within square brackets.

97. The prevailing view, however, was that the proposed amendment was excessively restrictive and should not be adopted. In the situation dealt with in paragraph (1), the court of the enacting State should be able to open an insolvency proceeding not only when the debtor had an establishment in the enacting State but also when it had assets in that State. That solution was considered realistic in view of the fact that a number of States currently allowed the opening of insolvency proceedings based on the presence of assets in the State. Furthermore, paragraph (1) also served as an indication that grounds for jurisdiction other than the presence of assets were not sufficient.

98. It was suggested that the limitation of the effects of a local proceeding to the assets of the debtor situated in the territory of the enacting State was too narrow and might, in some cases, limit the scope for a meaningful administration of local insolvency proceedings. The assets of a local establishment of a foreign corporation might not necessarily be all located in the enacting State (e.g. the local establishment might have an operating plant in a foreign jurisdiction). The interests of a local proceeding relating to such a local establishment might be best served if the entirety of the assets related to the local establishment could be administered or realized in those local proceedings, thus maximizing the value of the assets. It was therefore proposed to add the words "and such other property as may be appropriately administered within the proceedings in this State" at the end of paragraph (1).

99. In its deliberations, the Commission noted that the wording of paragraph (1), which provided an objective criterion for limiting the effects of local non-main proceedings, was not intended to impose a division of assets that belonged to one establishment solely on the basis of their territorial location. Moreover, that provision should not be perceived as precluding disposition of the debtor's assets in the enacting State as a going concern. At the same time, it was also felt that, in expanding the notion of "assets" in paragraph (1) to encompass assets other than those situated in the territory of the enacting State, care should be taken to avoid generating uncertainty in the application of that provision. A redrafted version of paragraph (1) should be kept in line with other provisions of the draft Model Provisions, such as article 17(3), in the new wording adopted by the Commission, which gave the court of the enacting State some latitude to determine, in the light of its own laws, which of the assets located in the territory of the enacting State should be administered in the foreign proceeding. Furthermore, it was felt that the concern that the interests of a local proceeding might be best served by a common administration or realization of assets situated both in the enacting State and in a foreign jurisdiction involved questions of coordination and cooperation, as appropriate, between the courts concerned. Therefore, it was considered necessary to make reference to such coordination in a redrafted version of paragraph (1) that incorporated the proposed amendment.

100. Having considered the different views expressed, the Commission agreed that paragraph (1) should be redrafted to provide that, upon recognition of a foreign main proceeding, the effects of a local proceeding in the enacting State should be restricted to the assets of the debtor situated in the territory of that State and, to the extent necessary to implement coordination and cooperation under article 21, to other assets of the debtor that, under the laws of that State, should be administered in such a proceeding.

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

Paragraph (2)

102. Various interventions were made questioning the need for paragraph (2), which established a rebuttable presumption of insolvency of the debtor, for the purposes of commencing an insolvency proceeding in the enacting
State, upon recognition of a foreign insolvency proceeding. It was pointed out that proof of insolvency of the debtor was not universally required for the opening of insolvency proceedings, since some legal systems authorized the opening of insolvency proceedings under specific circumstances defined by the law (e.g. cessation of payments) or upon accomplishment by the debtor of certain actions (e.g. dissipation of its assets, abandonment of its establishment).

The view was expressed that, for those legal systems, the presumption established by paragraph (2) would be of little practical consequence and might be misunderstood as introducing a new criterion for opening insolvency proceedings. Furthermore, paragraph (2) might cause particular difficulties in the event of recognition of a foreign interim proceeding, as it would not be appropriate to have a presumption of insolvency operating in the enacting State while there was no final adjudication of insolvent in the foreign jurisdiction. The Commission was therefore urged to delete paragraph (2).

103. In response to those views, it was observed that the purpose of paragraph (2) was not to introduce new substantive rules of law in the enacting State, but rather to make it possible for the court to open insolvency proceedings on the basis of a presumption of insolvency, without having first to establish that the debtor was insolvent, where such requirement existed. The words "in the absence of evidence to the contrary" made it clear that the court of the enacting State was not bound by the decision of the foreign court. As such, paragraph (2) was considered to be a useful provision that might help to simplify and expedite the proceedings in the enacting State. However, in view of the strong reservations that had been expressed to paragraph (2), it was agreed that the Guide to Enactment should indicate that the presumption established in paragraph (2) might not have practical significance in all States and that, in jurisdictions where proof of insolvent of the debtor was not required for the opening of insolvency proceedings, the enacting State might wish not to enact that provision.

104. The Commission proceeded to consider whether paragraph (2) should apply equally in the event of recognition of foreign main and non-main proceedings. The prevailing view was that it would not be appropriate to presume the insolvency of the debtor in the State where the debtor had the centre of its main interests solely on the basis of the opening of non-main proceedings in a foreign jurisdiction and that, therefore, paragraph (2) should be limited to the recognition of a foreign main proceeding.

105. The Commission approved the substance of paragraph (2), as amended, and referred it to the drafting group.

New paragraph (3)

106. The Commission also considered a proposal for adding a new paragraph (3) to article 22, along the following lines:

"(3) Where a foreign proceeding and a proceeding in this State under [identify laws of the enacting State relating to insolvency] are taking place concurrently regarding the same debtor, the court shall seek to achieve cooperation and coordination under article 21, subject to the following:

(a) if the proceeding under [identify laws of the enacting State relating to insolvency] is taking place at the time the application for recognition of the foreign proceeding is filed, article 16 does not apply and any relief under articles 15 or 17 must be consistent with the conduct of the proceeding under [identify laws of the enacting State relating to insolvency];

(b) if the proceeding under [identify laws of the enacting State relating to insolvency] commences after the filing of the application for recognition of the foreign proceeding, any relief in effect under articles 15, 16 or 17 shall be reviewed by the court and shall be modified or terminated if inconsistent with the conduct of the proceeding under [identify laws of the enacting State relating to insolvency];

(c) in granting, continuing or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding."
foreign proceeding to the assets which, under the laws of the enacting State, should be administered in that proceeding. That suggestion, too, was found to be excessively restrictive within the context of article 22 and did not attract sufficient support. It was, however, generally agreed that the Commission should examine the implications of possible conflicts between concurrent proceedings when it considered article 13 (see paragraphs 199-209, below).

110. After considering the views expressed on the proposed new paragraph (3), and following discussion of several proposals for improving its current formulation and presentation, the Commission approved the substance of the new draft paragraph (3) and referred it to the drafting group.

New paragraph (4)

111. The Commission also considered a proposal for adding a new paragraph (4) to article 22, along the following lines:

“(4) In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek to achieve cooperation and coordination under article 21, subject to the following:

“(a) after recognition of a foreign main proceeding any relief [granted] [to be granted] to a representative of a foreign non-main proceeding under article 15 or 17 must be consistent with the conduct of the foreign main proceeding;

“(b) if a foreign main proceeding is recognized after the filing of an application for recognition of a foreign non-main proceeding, any relief in effect under article 15 or 17 shall be reviewed by the court and shall be modified or terminated if inconsistent with the conduct of the foreign main proceeding;

“(c) after recognition of a foreign non-main proceeding, upon recognition of a subsequent foreign non-main proceeding, the court shall grant, modify or terminate relief to facilitate coordination of the proceedings.”

112. The Commission generally approved the substance of the proposed new paragraph (4) and, following discussion of a few proposals for improving its current formulation and presentation, the Commission referred it to the drafting group.

New paragraph (5)

113. The Commission also considered a proposal for adding a new paragraph (5) to article 22, along the following lines:

“(5) From the time of filing an application for recognition of a foreign proceeding, the foreign representative shall inform the court promptly of all foreign proceedings in respect of the debtor which are known to the foreign representative.”

114. It was suggested that, in addition to the information envisaged in the proposed new paragraph (5), provision should be made to require the foreign representative to inform the court of the status of his or her appointment (in particular of the termination of the appointment) or of the status of the foreign proceeding (in particular of its termination or its transformation from a liquidation proceeding into a reorganization proceeding). It was said that giving such information to the court might be important in all circumstances, but was particularly important when the foreign proceeding had been opened on an interim basis or the foreign representative had been appointed provisionally.

115. For that purpose, it was suggested that one possible approach to providing such a duty might be to introduce a new subparagraph in article 13 requiring the foreign representative to submit an undertaking to inform the court of any change in the status of the foreign proceeding or of his or her appointment. The Commission decided to consider that proposal within the context of its deliberations on article 13 (see paragraph 207, below).

116. Subject to the above deliberations, the Commission approved the substance of paragraph (5) and referred it to the drafting group.

Article 20. Intervention by a foreign representative in actions in this State

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

“Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in [individual actions] [proceedings] in which the debtor is a [claimant or defendant] [party].”

118. The Commission noted that the purpose of draft article 20 was to give the foreign representative standing to appear in court and to make representations in proceedings, whether individual court actions or other proceedings (including extrajudicial proceedings) instituted by the debtor against a third party, or by a third party against the debtor, and which had not been stayed under article 16(1) or 17.

119. It was suggested that the right to intervene should be available only to the representative of a foreign main proceeding. The prevailing view, however, was that also the representative of a foreign non-main proceeding could have a legitimate interest in the outcome of a dispute between the debtor and a third party and that the provision should not exclude that possibility.

120. The concern was expressed that, as currently drafted, draft article 20 permitted the foreign representative to intervene in any proceedings in which the debtor was a party, which might include proceedings concerning the personal affairs of the debtor (e.g. actions in family law matters). That result was found to be undesirable, and, in that connection, it was suggested that the foreign representative’s right to intervene should be restricted to proceedings concerning the debtor’s assets. Additionally, it was suggested that article 20 should expressly provide that intervention by the foreign representative should be subject
to the provisions of the laws of the enacting State governing third party intervention in judicial proceedings.

121. In response to that suggestion it was observed that in legal systems that recognized insolvency proceedings of natural persons, such as individual traders or merchants, it would sometimes be difficult to establish a clear distinction between the debtor’s business and personal affairs, and that proceedings apparently falling in the latter category might well have influence on the debtor’s assets and liabilities. In those situations, the foreign representative might have a legitimate interest to intervene in such proceedings. It was therefore generally felt that the Commission should not attempt to circumscribe the scope of the intervention under draft article 20, so as to avoid creating an unnecessary and undesirable limitation of the foreign representative’s ability to intervene in those proceedings. In most jurisdictions where it was possible for a party to intervene in a dispute between two other parties, national procedural law contemplated requirements to be met by such intervening party so as to be permitted by the court deciding the dispute to be heard in the proceedings (e.g. legal interest in the outcome of the dispute). Such requirements were generally recognized by article 20. However, an express reference in article 20 to the specific requirements to be met under the laws of the enacting State was found to be unnecessary and difficult to formulate, given that in many jurisdictions they might be scattered in various legal texts or result from case law and might vary according to the nature of the proceeding.

122. As regards the bracketed language in article 20, there was general preference for retaining the words “proceedings” and “party” and deleting the remaining bracketed language.

123. After deliberations, the Commission approved the substance of article 20 and referred it to the drafting group.

Article 21. Authorization of cooperation and direct communication with foreign courts and foreign representatives

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

“(1) In matters referred to in article 1, a court referred to in article 4 shall cooperate to the maximum extent possible with foreign courts, either directly or through a [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] or a foreign representative. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

“(2) In matters referred to in article 1, a [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] shall, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives. The [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] is permitted, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, to communicate directly with foreign courts or foreign representatives.

“(3) Cooperation may be implemented by any appropriate means, including:

“(a) appointment of a person or body to act at the direction of the court;

“(b) communication of information by any means deemed appropriate by the court;

“(c) coordination of the administration and supervision of the debtor’s assets and affairs;

“(d) approval or implementation by courts of agreements concerning the coordination of proceedings;

“(e) coordination of multiple proceedings regarding the same debtor [coordination of main or non-main foreign proceedings and a proceeding in this State under [identify laws of the enacting State relating to insolvency] in respect of the same debtor;]

“(f) [the enacting State may wish to list additional forms or examples of cooperation].”

125. General support was expressed for the substance of article 21. A view was also expressed that matters pertaining to judicial cooperation in general, including cooperation in insolvency matters, were more suitable for being addressed in bilateral or multilateral treaties, which typically provided for cooperation based on reciprocity. For some States it was doubtful whether a workable framework for judicial cooperation could be established exclusively by way of a national statute, in particular since it was difficult to incorporate in it the concept of reciprocity. However, it was generally agreed that that view should not be understood as questioning the usefulness of the Model Provisions for the purposes of promoting the objectives of greater judicial cooperation in insolvency matters.

126. With regard to paragraph (2), the words “subject to the supervision” were preferred to the words “without prejudice to the supervisory functions”.

127. In respect of paragraph (3)(a), the view was expressed that the words “at the direction of the court” might not be appropriate in all circumstances, since some cases might be best served by giving the appointed person ample authority to cooperate with the foreign court or representative. That view did not attract sufficient support.

128. With regard to paragraph (3)(e), it was agreed to retain the language in the first set of brackets and delete the remaining bracketed language.

129. Having discussed a few proposals to improve the wording of article 21, including the deletion of the words “authorization of” from its title, the Commission approved its substance and referred it to the drafting group.

130. In response to that suggestion it was observed that in legal systems that recognized insolvency proceedings of
Article 23. Rate of payment of creditors

130. The text of the article, as discussed by the Commission, was as follows:

"Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding commenced in another State may not receive a payment for the same claim in a proceeding commenced in this State under [identify laws of the enacting State relating to insolvency] with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding commenced in this State is proportionately less than the payment the creditor has already received."

131. The Commission noted that the purpose of draft article 23 was to avoid situations in which a creditor might obtain a more favourable treatment than the other creditors of the same class by obtaining payment of its claim in more than one proceeding being simultaneously conducted in different jurisdictions in respect of the same debtor.

132. Proposals were made to replace the words "secured claims" and "rights in rem", with reference to "privileged claims", "preferred claims" or other expressions with a similar meaning. In response it was noted that, as provided in draft article 11(2), the Model Provisions did not affect the ranking of claims pursuant to the laws of the enacting State and that article 23 was solely intended to establish the equal treatment of creditors of the same class. However, to the extent secured creditors or creditors with rights in rem were paid in full regardless of the ranking of their claims (a matter that depended on the insolvency law of the State where the proceedings were conducted), those creditors should be excluded from the scope of application of draft article 23.

133. The Commission discussed the meaning of the expressions "secured claims" and "rights in rem". It was explained that the first referred to claims guaranteed by particular assets and the second to rights relating to a particular property and enforceable against third parties. A given right might fall within the ambit of both expressions, but not necessarily so, depending on the classification and terminology of the applicable law. It was noted that different legal systems might prefer to use other terms of art for expressing those concepts. For clarity purposes, it was agreed that both expressions should be retained in article 23.

134. Following discussion of a few proposals for improving its current formulation, the Commission approved the substance of draft article 23 and referred it to the drafting group.

Preamble

135. The text of the preamble, as considered by the Commission, was as follows:

"The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

"(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

"(b) greater legal certainty for trade and investment;

"(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

"(d) protection and maximization of the value of the debtor's assets; and

"(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment."

136. The Commission noted that the purpose of the preamble was to give a succinct statement of the basic policy objectives of the Model Provisions, rather than to create substantive rights. It was observed that, in States where it was not customary to set out preambular statements of policy in legislation, consideration might be given to including the statement of objectives either in the body of the statute or in a separate document, so as to preserve a useful tool for the interpretation of the law.

137. A proposal was made to delete the words "thereby protecting investment and preserving employment" in subparagraph (e). It was stated that those words did not belong in the preamble of a text that did not contain any provision directly concerned with protecting investment or preserving employment. It was pointed out that the basic objective of the Model Provisions was to facilitate the conduct of insolvency proceedings with cross-border elements. However desirable, the rescue of a financially troubled business might not always be a viable solution, and many insolvency proceedings might inevitably lead to the liquidation of that business. Furthermore, the interests of creditors, referred to in subparagraph (c), might not always be compatible with protecting investment and preserving employment.

138. In response to that proposal, which was not adopted by the Commission, it was observed that an objective such as the one mentioned in subparagraph (e) was in line with a number of national insolvency laws. The preamble to the draft Model Provisions contained a statement of basic policy objectives and not of mandatory objectives. It would be incorrect to regard those objectives as being contradictory only because, in individual cases, some of them might take precedence over the others. Besides, while liquidation of the business was often the inevitable outcome of insolvency proceedings, many proceedings were concluded with a successful reorganization of the business. With regard in particular to subparagraph (e), it was noted that the protection of investment and the preservation of employment were not independent objectives, but rather expected consequences from the rescue of financially troubled businesses. The latter objective was pursued by many national laws on insolvency proceedings and deserved being mentioned in the preamble to the Model Provisions.

139. Subject to the above deliberations, the Commission approved the substance of the preamble and referred it to the drafting group.
Article 1. Scope of application

140. The text of the article, as considered by the Commission, was as follows:

"(1) This [Law] [Section] applies where:

"(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

"(b) assistance is sought in a foreign State in connection with a proceeding in this State under [identify laws of the enacting State relating to insolvency]; or

"(c) a foreign proceeding and a proceeding in this State under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or

"(d) creditors or other interested parties in a foreign State have an interest in requesting the commencement of or participating in a proceeding in this State under [identify laws of the enacting State relating to insolvency]."

Paragraph (1)

141. The Commission considered at length the question whether article 1 should be amended for the purpose of expressly excluding proceedings concerning consumers from the scope of application of the Model Provisions.

142. Various interventions were made in support of such an exclusion. It was stated that a number of jurisdictions had special legislation on consumer protection. For those jurisdictions, it was important to avoid the impression that the Model Provisions intended to extend to consumers the same insolvency regime that applied to companies and traders. Issues of consumer protection might reduce the willingness of those States to enact the Model Provisions. The proposed exclusion was further needed as not all legal systems recognized insolvencies of individuals other than traders, and even in those jurisdictions where insolvency proceedings could be opened in respect of an individual, such insolvency would often be conducted under a special regime, particularly in jurisdictions that distinguished between civil and commercial activities. Besides, in the absence of an explicit exclusion, the courts of those States that did not provide consumer insolvencies might exclude them by invoking the public policy exception, which might lead to excessive use, and an excessively broad interpretation, of the public policy exception. For the purpose of effecting the proposed exclusion, it was suggested to amend article 1 so as to provide that if a debtor's debts were incurred predominantly for personal, family or household purposes, rather than for business purposes, a proceeding regarding that debtor was excluded from the ambit of the Model Provisions. Alternatively, it was suggested to provide in a footnote to article 1 that the enacting State had the option to exclude proceedings concerning consumers from the scope of application of the Model Provisions.

143. That proposal raised strong objections. It was noted that, in its consideration of the draft Model Provisions, the Commission was mindful of the need for uniformity in the field of cross-border insolvency and therefore had avoided making use of footnotes or options that would allow for departures from the uniform text. It was also noted that a number of jurisdictions did not enquire as to the nature of the debtor's debts for insolvency purposes, nor did they exclude consumers or other individuals from the ordinary insolvency regime. The proposed exclusion might be construed as a recommendation for those jurisdictions to consider introducing new categories of insolvency proceedings into their national laws. Besides, the notion of debts incurred for "family purposes" was found to be unclear and susceptible to misuse by unscrupulous debtors.

144. In response to those objections it was noted that the work of the Commission had been essentially focused on trade law issues and that consumer transactions had been expressly excluded in a number of texts previously adopted by the Commission, such as the United Nations Convention on Contracts for the International Sale of Goods11 and the UNCITRAL Model Law on Electronic Commerce.12

145. After considering the various views expressed, it was agreed that the text of paragraph (1) should be retained and that the Guide to Enactment should indicate that, in those jurisdictions that did not recognize consumer insolvencies or where the insolvency of non-traders did not fall under the same insolvency regime that applied to corporations and traders, the enacting State might wish to exclude from the scope of application of the Model Provisions those insolvencies that related to natural persons residing in the enacting State whose debts were incurred predominantly for personal or household purposes, rather than for commercial or business purposes, or to non-traders. The Guide to Enactment should also suggest that the enacting State might wish to provide that such exclusion would not apply in cases where the total debts exceeded a certain monetary ceiling.

Paragraph (2)

146. As a general comment, it was noted that paragraph (2) appeared to impose the exclusion of the entities mentioned therein from the ambit of the Model Provisions. It was pointed out, however, that the enacting State might wish that insolvency proceedings opened in its territory, although conducted under a special regulatory regime, would nevertheless be accorded recognition abroad. A view was also expressed that a possible approach in national law might be to treat the foreign insolvency proceedings opened in its territory, although conducted under a special regulatory regime, as being excluded from the ambit of the Model Provisions. Alternatively, it was suggested to provide in a footnote to article 1 that the enacting State had the option to exclude proceedings concerning consumers from the scope of application of the Model Provisions.

147. The Commission proceeded to discuss whether the scope of the exclusion under paragraph (2), which currently referred only to financial services institutions, should be expanded so as to encompass entities other than financial services institutions. In favour of such an expansion it was indicated that national laws sometimes provided special insolvency regimes for other types of enterprises, such as public utility companies, or excluded those enterprises from the scope of application of their insolvency laws. It was suggested that, without such an exclusion, some enacting States might be inclined to make use of the public policy exception provided in article 6. With a view to discouraging wide resort to public policy exceptions, exclusions under paragraph (2) would best be left to national law.

148. In reply to that proposal it was observed that the draft Model Provisions had been formulated so as to apply to any proceeding that met the requirements of article 2(a), independently of the nature of the debtor or its particular status under national law. The only exceptions were those contemplated in paragraph (2), which was purposely limited to financial services institutions. That exclusion was largely acceptable because insolveniences of financial services institutions usually required prompt and discrete action (for instance to avoid massive withdrawals of deposits) and were, for that reason, administered under special regulatory regimes in various States. The Commission was therefore urged not to expand the scope for exclusions under paragraph (2).

149. Upon consideration of the various views expressed, it was agreed that it would be preferable to allow for exclusions under paragraph (2) rather than to encourage enacting States to make use of public policy exceptions. It was therefore decided that the words "financial services institutions" should be deleted from paragraph (2). However, with a view to making the Model Provisions more transparent (for the benefit of foreign users of the law based on the Model Provisions), it was considered that all exclusions from the scope of the Model Provisions should be expressly mentioned by the enacting State in paragraph (2).

150. Subject to the amendments mentioned above, the Commission approved the substance of paragraph (2) and referred it to the drafting group.

**Article 2. Definitions**

151. The text of the article, as considered by the Commission, was as follows:

"For the purposes of this Law:

(a) ‘foreign proceeding’ means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) ‘foreign main proceeding’ means a proceeding taking place in the State where the debtor has the centre of its main interests;

(c) ‘foreign non-main proceeding’ means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) ‘foreign representative’ means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

(e) ‘foreign court’ means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) ‘establishment’ means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

Subparagraphs (a) to (c)

152. It was decided that the word “foreign” should be added in subparagraphs (b) and (c) before the word “proceeding” to make it clear that reference was made to the definition of “foreign proceeding” contained in subparagraph (a). It was also decided to clarify in subparagraph (c) that a “foreign non-main proceeding” was a foreign proceeding “other than a foreign main proceeding” that took place in a State where the debtor had an establishment.

153. The view was expressed that the meaning of the term “centre of main interests” in subparagraph (b) was not clear and that its use would create uncertainty. In response, it was stated that that term was used in the European Union Convention on Insolvency Proceedings and that the interpretation of the term in the context of that Convention would be useful also in the context of the Model Provisions.

154. The suggestion was made that “foreign non-main proceeding” in subparagraph (c) should also be a proceeding opened in the respective foreign State on the ground that the debtor had assets, but not an establishment, in that State. The Commission, however, decided that a foreign non-main proceeding susceptible to recognition under article 13(3)(b) should only be a proceeding commenced in a State where the debtor had an establishment in the meaning of article 2(f). It was considered that that decision should not affect the decision taken in the context of article 22(1), namely, that an insolvency proceeding could be opened in the enacting State on the ground that the debtor had assets in the State. It was noted that the effects of an insolvency proceeding opened on the basis of the presence of assets in the State were, according to article 22(1), normally restricted to the assets located in that State; if other debtor’s assets located abroad should, under the law of the enacting State, be administered in that insolvency proceeding, that cross-border issue was to be dealt with as a matter of international cooperation and coordination under article 21.

155. Subject to the drafting changes decided on, the Commission adopted the substance of subparagraphs (a) to (c).
Subparagraphs (d) and (e)

156. The suggestion was made that the words "or to act as a representative of the foreign proceeding" contained in subparagraph (d) should be deleted. The Commission, however, decided to retain the current text since acting abroad as a representative of the insolvency proceeding might be the main purpose of the appointment.

157. In response to a question raised as to the purpose of including in the definition of "foreign court" non-judicial authorities, it was said that a foreign proceeding that met the requisites of article 2(a) should be recognized even if it was opened by a non-judicial authority; as a drafting matter, the definition of the foreign court included non-judicial authorities in order to obviate the need to refer to a foreign authority other than a court whenever reference was made to a foreign court. It was pointed out that subparagraph (e) followed a similar definition adopted in article 2(d) of the European Union Convention on Insolvency Proceedings. The Commission adopted subparagraph (e) unchanged.

Subparagraph (f)

158. It was decided to add, at the end of subparagraph (f), the words "or services". It was noted that, except for the added words, the definition was closely modelled on the definition of "establishment" in article 2(g) of the European Union Convention on Insolvency Proceedings. Subject to that addition, the Commission adopted subparagraph (f).

Article 3. International obligations of this State

159. The text of the article, as considered by the Commission, was as follows:

"To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail."

160. The Commission agreed with the principle embodied in article 3.

161. It was observed that, while in some States binding international treaties were self-executing, in other States international treaties were, with certain exceptions, not self-executing in that they required internal legislation for them to become enforceable law. With respect to the latter group of States, it was noted that, in view of their normal practice in dealing with international treaties and agreements, it would be inappropriate or unnecessary to include article 3 in their legislation or it might be appropriate for certain States to include it in modified form. It was agreed that the Guide to Enactment should reflect that situation.

162. The Commission considered a suggestion that, in order to avoid an unnecessarily broad interpretation of international treaties, article 3 should emphasize that a treaty displaced a Model Provision only when the treaty regulated the subject matter of the provision in question. In support of the suggestion, it was stated that in its current formulation article 3 might inadvertently result in giving precedence to an international treaty that was drafted broadly and dealt with some matters addressed by the Model Provisions in an indirect way (e.g. matters such as access to courts and cooperation between courts or administrative authorities). Such a result, it was said, would reduce certainty and predictability in the application of the Model Provisions and would compromise its goal to achieve uniformity and to facilitate cross-border cooperation in cross-border insolvency. That suggestion was not met with sufficient support. It was pointed out that no additional wording was necessary since a conflict between the Model Provisions and a treaty could arise under article 3 only when the two texts regulated the same subject matter. In addition, it was stated that additional wording such as the one proposed might raise interpretation problems. The Commission adopted article 3 unchanged. It was agreed that the Guide to Enactment should reflect that understanding.

163. The text of the article, as considered by the Commission, was as follows:

"The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts or authority competent to perform those functions in the enacting State]."

[Footnote to the title of article 4]: "A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

"Nothing in this Law affects the provisions in force in this State governing the authority of [insert the designation of the government-appointed person or body]."

164. It was noted that the competence for the various judicial functions dealt with in the Model Provisions might lie with different courts in the enacting State, and that the enacting State would designate specific courts according to its own system of court competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the insolvency legislation for the benefit of, in particular, foreign representatives and foreign courts.

165. For clarity purposes, it was decided that the title of article 4 should read "[Competent court or authority]."

166. With the above amendment, the Commission approved the substance of article 4 and referred it to the drafting group.
Article 5. Authorization of [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] to act in a foreign State

167. The text of the article, as considered by the Commission, was as follows:

"A [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding in this State under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law."

168. The Commission noted that the intent of article 5 was to equip administrators or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings. The lack of such authorization in some States has proved to be an obstacle to effective international cooperation in cross-border cases.

169. The Commission approved the substance of article 5 and referred it to the drafting group.

Article 6. Public policy exceptions

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

"Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."

171. It was observed that the notion of public policy was grounded in national law and might differ from State to State. The term "public policy" was understood differently in national laws; in some legal systems, it was understood broadly in the sense that it might relate to any imperative rule of national law while in other legal systems it related solely to the core of fundamental provisions of law. In some of those legal systems there was a dichotomy between the notion of public policy as it applied to domestic affairs, and the notion of public policy that was used in private international law matters. In the latter situation, the exception of public policy was construed as relating to fundamental principles of law, in particular the constitutional guarantees and individual rights, and was only used to refuse the application of foreign law, or the recognition of a foreign judgement or arbitral award, when that would contravene those fundamental principles. It was noted, for example, that, if the courts applied their broad "domestic" notion of public policy to the recognition of foreign judicial decisions, very few foreign decisions would ever be recognized since most foreign proceedings would, in one or the other aspect, depart from procedures which, internally, constituted matters governed by imperative rules. The prevailing view within the Commission was that article 6 should use the notion of public policy in a restrictive sense so that it would only be invoked in rare cases and that, with a view to achieving the objectives of the Model Provisions, it was desirable to avoid giving a broad interpretation to the notion of public policy.

172. It was suggested that the word "manifestly", used as the qualifier of "public policy", should be deleted since it was not clear what it meant. It was said that, in the context of international insolvency, it was inappropriate to restrict the operation of public policy only to cases where the violation of it was manifest. The prevailing view, however, was that the qualifier should be kept in order to facilitate international cooperation and to avoid a situation where cooperation under the Model Provisions would be frustrated because the particular step or measure was seen to be contrary to a mere technicality of a mandatory nature. Furthermore, it was observed that the word was used in many international legal texts and that its objective and meaning were well understood: its purpose was to emphasize that public policy exceptions should be interpreted restrictively and that article 6 was only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

173. Subject to the above deliberations, the Commission approved the substance of article 6 and referred it to the drafting group.

Additional provisions to chapter I (articles 1-6)

174. A proposal was made to add to chapter I (articles 1-6) of the draft Model Provisions an article similar to article 3(1) of the UNCITRAL Model Law on Electronic Commerce to the effect that, in the interpretation of the Model Provisions, regard was to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. The Commission accepted that proposal and referred the matter to the drafting group.

175. Another proposal was made to add to chapter I of the draft Model Provisions an article to the effect that nothing in the Model Provisions limited the power of the court to provide greater assistance to a foreign representative under any other laws of the enacting State. The Commission approved that proposal and referred it to the drafting group.

Article 7. Right of direct access

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

"A foreign representative is entitled to apply directly to a court in this State."

177. The Commission noted that article 7 was limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular actions.

178. The Commission approved the substance of article 7 and referred it to the drafting group.
Article 8. Limited jurisdiction

179. The text of the article, as considered by the Commission, was as follows:

"The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application."

180. The Commission noted that the provision was a useful "safe conduct" rule aimed at ensuring that the court in the enacting State would not assume jurisdiction over the entire debtor's assets on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding. It was pointed out that concerns of foreign representatives or creditors about the possibility of all-embracing jurisdiction triggered by an application for relief had, in practice, caused considerable difficulties in cross-border insolvency. It was noted that the article might not appear necessary in States where the rules on jurisdiction did not allow a court to assume jurisdiction over a person making an application to the court on the sole ground of the applicant's appearance; however, also in those States, the enactment of the article was useful in that it assured foreign representatives that the court of the enacting State would not assume jurisdiction on the sole ground that the foreign representative filed an application with the court.

181. The Commission further noted that the limitation on jurisdiction over the foreign representative embodied in article 8 was not absolute and was only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. Other possible grounds for jurisdiction under the laws of the enacting State, such as the possible misconduct and the resulting liability of the foreign representative, were not affected by article 8.

182. The Commission approved the substance of article 8 and referred it to the drafting group.

Article 9. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

183. The text of the article, as considered by the Commission, was as follows:

"[Upon recognition,] a foreign representative may apply to commence a proceeding in this State under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding under the law of this State are otherwise met."

184. It was noted that national laws, in enumerating persons who may apply to commence an insolvency proceeding, often did not mention a representative of a foreign insolvency proceeding. As a result, questions might arise as to whether the foreign representative had standing for making the application. Article 9 answered those questions by ensuring that the foreign representative had standing for requesting the opening of an insolvency proceeding.

185. The Commission considered the question whether the foreign representative could apply to commence an insolvency proceeding prior to recognition. The prevailing view was in favour of giving the foreign representative that right without requiring prior recognition. It was pointed out that such a possibility might be crucial in cases of urgent need for preserving the assets of the debtor. It was further noted that article 9 already provided sufficient guarantees against abusive applications by requiring that the conditions for commencing such a proceeding under the law of the enacting State had to be met.

186. Interventions were made to suggest that the right to request the opening of insolvency proceedings should not be extended to a representative in a foreign non-main proceeding. It was pointed out that the opening of a proceeding might interfere with the administration of the main proceeding and that, in the interest of enhancing the coordination of insolvency proceedings, only a representative of a foreign main proceeding should be granted that right. However, pursuant to another view, which eventually prevailed, the proposed limitation should not be introduced, as it would render the article excessively rigid. In support of retaining the current wording, it was noted that a representative in a non-main proceeding might have a legitimate interest in requesting the opening of a proceeding in the enacting State, for instance, where no main proceeding within the meaning of the Model Provisions had been opened.

187. Subject to the deliberations above, the Commission approved the substance of article 9 and referred it to the drafting group.

Article 10. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

188. The text of the article, as considered by the Commission, was as follows:

"Upon recognition of a foreign proceeding, the foreign representative may participate in a proceeding concerning the debtor in this State under [identify laws of the enacting State relating to insolvency]."

189. The Commission approved the substance of article 10 and referred it to the drafting group.

Article 11. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

190. The text of the article, as considered by the Commission, was as follows:

"(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding in this State under [identify laws of the enacting State relating to insolvency] as creditors in this State."

"[Upon recognition,] a foreign representative may participate in a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State."
(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of unsecured non-preference claims], while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims. 

193. The text of the article, as considered by the Commission, was as follows:

"(1) Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have an address in this State. [The court may order that appropriate steps be taken with a view to notifying any creditors whose address is not yet known.]

"(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

"(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

"(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

"(b) indicate whether secured creditors need to file their secured claims; and

"(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court."

194. The Commission noted that the main purpose of notifying foreign creditors as provided in paragraph (1) was to inform them of the commencement of the insolvency proceeding and of the time limit to file their claims. Furthermore, as a corollary to the principle of equal treatment established by draft article 11, draft article 12 required that foreign creditors should be notified whenever notification was required for creditors in the enacting State.

195. With regard to the form of the notification, it was pointed out that many States provided special procedures for notifications that had to be served in a foreign jurisdiction (e.g., letters rogatory). Those procedures were often cumbersome and time-consuming and their use would not ensure that foreign creditors received timely notice concerning insolvency proceedings in the enacting State. It was therefore suggested that article 12 should be amended to provide that the notification provided therein could be effected by mail or any other means that the court deemed to be adequate in the circumstances.

196. In reply to that proposal, it was pointed out that the form of notification varied in different jurisdictions and that it would be preferable to leave that question entirely to the laws of the enacting State. Furthermore, a number of States were parties to bilateral or multilateral treaties and conventions on judiciary cooperation, such as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which provided simplified procedures for the communication of court orders and notifications among the signatory States. It was felt that the proposed amendment, which prescribed one particular form of notification (i.e., postal notification) might be inconsistent with the international obligations of those States, which would then be compelled to invoke article 3 to refuse to apply such a new provision.

197. The prevailing view, however, was that the proposed amendment would not generate conflict with the international obligations of the enacting State, since the treaties and conventions that had been alluded to normally did not preclude the State to use simplified notification procedures in the circumstances dealt with in the article. It was agreed that in paragraph (2) words along the following lines should be added: "no letters rogatory or other similar formalities are required".

198. Subject to the above deliberations, the Commission approved the substance of article 12 and referred it to the drafting group.
Article 13. Recognition of a foreign proceeding and of a foreign representative

199. The text of the article, as considered by the Commission, was as follows:

“(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative’s appointment.

“(2) An application for recognition shall be accompanied by:

“(a) the duly authenticated decision [or decisions] commencing the foreign proceeding and appointing the foreign representative; or

“(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

“(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

“(3) Subject to article 14, the foreign proceeding shall be recognized:

“(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor’s main interests; or

“(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

“(4) Absent proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is deemed to be the centre of the debtor’s main interests.

“(5) If the decision or certificate referred to in paragraph (2) of this article indicates that the foreign proceeding is a proceeding as defined in article 2(a) and that the foreign representative has been appointed within the meaning of article 2(d), the court is entitled to so presume.

“(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

“(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

“(8) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.”

200. The Commission noted that, under the Model Provisions, the recognition of a foreign representative did not occur independently from the recognition of the foreign proceeding in which the foreign representative had been appointed. It was therefore decided that, for purposes of clarity, the words “and of a foreign representative” should be deleted from the title of article 13. For the same reason, it was agreed to delete the words “and of the foreign representative’s appointment” in paragraph (1) and replace those words with the words “in which the foreign representative has been appointed”.

201. It was pointed out that the use of the word “jurisdiction” in paragraph (3)(a) might lead to disputes as to whether the foreign court was in fact entitled to assume jurisdiction over the foreign proceeding. The Commission therefore decided to redraft that paragraph so as to qualify a foreign main proceeding as one that took place in the State where the debtor had the centre of its main interests.

202. With regard to paragraph (3)(b), it was noted that the Model Provisions did not envisage recognition of a proceeding opened in a foreign State in which the debtor had assets but no establishment as defined in article 2(c). That solution was criticized since the Model Provisions allowed opening of an insolvency proceeding in the enacting State even if there was no establishment in that State (article 22(1), which required only the presence of assets in the enacting State), but did not contemplate recognition of a foreign proceeding if there was no establishment in the foreign State. That criticism was not supported.

203. Questions were asked as to the relationship between the notion of “legalization” in paragraph (6) and the notion of “authenticated” document in paragraph (2)(a). In response it was noted that paragraph (2)(a) referred to procedures normally followed in the originating jurisdiction to certify that the documents in question were accurate and had been issued by the named authorities. Paragraph (6), in turn, referred to formalities by which diplomatic or consular agents of the enacting State certified matters such as authenticity of signatures, the capacity in which the person signing the document had acted, or the identity of the seal or stamp on a document. Legalization procedures were often cumbersome and time-consuming, and might in some cases involve various authorities at different levels or offices. That was the reason why paragraph (6) dispensed with the requirement of legalization, having regard to the need for expediting the proceedings in the enacting State.

204. In respect of paragraph (6), the view was expressed that eliminating legalization requirements might be in conflict with the international obligations of the enacting State. Several States were parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, adopted under the auspices of the Hague Conference on Private International Law, which provided specific simplified procedures for the legalization of documents originating from signatory States. In response it was stated, however, that the referred to Hague Convention left in effect, for example, any laws, regulation or practice that abolished or simplified legalization procedures and that therefore a conflict was unlikely to arise. To the extent that there might exist a conflict, article 3 provided a solution.

205. Also, the concern was expressed that paragraph (6) seemed to preclude the possibility for the court to require legalization. The view was expressed that the court in some jurisdictions might find it difficult to act on the basis of foreign documents that had not been legalized through procedures regularly used in the enacting State, particularly with regard to documents emanating from jurisdictions with which they had limited or no familiarity. It was suggested that paragraph (6) should authorize the court, in exceptional circumstances, to require legalization.

206. Having considered the different views expressed, the Commission decided that it was important, for the purpose of expediting the recognition procedure, to provide that prior legalization was not mandatory for the court to act upon an application for recognition, and that the court was authorized to presume that the documents submitted with the application were authentic even if they had not been legalized. It was decided to replace the words “duly authenticated” with the words “certified copy of the” in paragraph (2)(a).

207. The Commission was reminded of its earlier discussions concerning the possibility of modification of the court’s decision to recognize the foreign proceeding and of its decision to reconsider that matter within the context of article 13 (see paragraphs 91-92, above). For the purpose of addressing that issue, it was proposed to add a new paragraph to article 13 to provide that nothing in articles 13 and 14 precluded the modification or termination of recognition when the grounds for granting recognition were lacking or ceased to exist in full or in part. The Commission generally concurred with that proposal and referred it to the drafting group. It was agreed that the Guide to Enactment should contain an explanation to the effect that such modification or termination would normally follow the procedures that governed, in the enacting State, appeal or rescission of judicial decisions. The Commission also decided to include in article 13 a provision obligating the foreign representative to inform the court, from the time of filing the application for recognition of the foreign proceeding, of any substantial change in the status of the foreign proceeding or the status of the foreign representative’s appointment (see paragraphs 114 and 115, above).

208. A proposal was made to insert an additional paragraph in article 13 to the effect that the recognition granted under that article had only the consequences set forth in the Model Provisions. It was explained that the proposal was intended to address a concern previously expressed that, in the system of the Model Provisions, the recognition of a foreign proceeding did not entail that the foreign proceeding would have in the enacting State the full range of legal effects that it had in the originating jurisdiction. That proposal was objected to on the ground that the Model Provisions gave the foreign representative a number of faculties (e.g. to intervene in local proceedings; to participate in local collective proceedings; to apply for relief) which were not entirely regulated in the Model Provisions and which the foreign representative would have to exercise in accordance with other laws of the enacting State. Therefore, it would be inappropriate to provide that the effects of the recognition were limited to the consequences set forth in the Model Provisions. Accordingly, the proposed addition was not adopted.

209. Subject to the above decisions, the Commission approved the substance of article 13 and referred it to the drafting group.

*Article 19 bis. Actions to avoid acts detrimental to creditors*

210. The text of the article, as considered by the Commission, was as follows:

“Upon recognition of a foreign proceeding, the foreign representative [is permitted] [has standing] to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available, according to the law of the enacting State, to the local insolvency administrator in the context of insolvency proceedings in the enacting State].”

211. The Commission considered the question whether the Model Provisions should expressly provide that a foreign representative had procedural “standing” (a concept in some procedural systems referred to by expressions such as “active procedural legitimation”, “active legitimation” or “legitimation”) to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors (such actions were sometimes referred to as “Paulian actions”).

212. It was widely considered that the right to commence such actions was in the interest of creditors and that they were essential, and sometimes the only effective means, for protecting the integrity of the debtor’s assets. Considerable support was expressed for the view that a foreign representative should not be prevented from initiating such actions by the sole fact that the foreign representative was not the insolvency administrator appointed in the enacting State.

213. It was said that, if such standing was to be conferred on the foreign representative, it should extend only to actions that were available to the local insolvency administrator in the context of an insolvency proceeding opened in the enacting State; care should be taken to avoid creating an impression that the foreign representative was equated with individual creditors, who under many legal systems had a right to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors. It was stressed that the conditions for an action that might be initiated by an insolvency administrator were different from the conditions for actions that might be brought by individual creditors.

214. Strong opposition was expressed to including such a provision in the Model Provisions. It was said that such actions had the potential of creating uncertainty about concluded or performed transactions; that they encompassed cases where the parties to such transactions were deemed to have acted to the detriment of creditors (but in fact might have been unaware of the detrimental effect) and that, thus,
the actions unnecessarily affected third parties who were in good faith and unaware of the possibility that a concluded transaction could be rendered ineffective; that such actions were based on the premise that the debtor was subject to an insolvency proceeding in the State, which (apart from the fact that the foreign proceeding was recognized in the enacting State) was not the case; that, because of a potentially destabilizing effect of such actions, the administration of loans might be adversely affected; that the issue in question was of great complexity and did not lend itself to a harmonized solution within the framework of the Model Provisions.

215. During the discussion the view prevailed that a provision on the subject was desirable in the Model Provisions. It was understood that the provision should only confer standing to bring actions under consideration. In particular, the provision should not create substantive rights and should not take a stand as to which law was applicable to a claim that a transaction should be avoided or otherwise rendered ineffective.

216. The Commission adopted the prevailing view and requested the drafting group to prepare the text of the draft article using draft article 19 as a basis. The Commission also adopted the proposal that, if the foreign proceeding was a non-main proceeding, the limitation analogous to the one expressed in draft article 17(3) should be included in the provision, namely, that “the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding”.

4. Review of the draft text prepared by the drafting group

217. After its substantive consideration of the draft Model Provisions, the Commission reviewed the draft articles prepared by the drafting group, which had been established with the task of implementing the decisions taken by the Commission (see paragraph 28, above).

218. The Commission approved the suggestion that the draft text should bear the title “Model Law” rather than “Model Provisions”, in line with other pieces of model legislation prepared by the Commission and in recognition of the possibility that the text could be enacted as a separate statute or as a discrete section or part of a law on insolvency.

219. During its review, the Commission made minor drafting changes. The text, as reviewed by the Commission, and subsequently approved at its 630th meeting on 30 May 1997 (see paragraph 221, below), is reproduced in annex 1 to the present report.15

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15 The new article numbers assigned to the provisions of the UNCITRAL Model Law on Cross-Border Insolvency upon adoption by the Commission and the articles as presented in the draft Model Legislative Provisions before the Commission were as follows:

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<th>Number of article in Model Law</th>
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5. Preparation of the Guide to Enactment

220. The Commission, after finalizing the substantive consideration of the Model Law, did not have time to consider the "draft Guide to Enactment of the UNCITRAL Model Provisions on Cross-Border Insolvency", prepared by the Secretariat (A/CN.9/436). Nevertheless, the Commission wished that the Guide should be prepared as soon as feasible after the session of the Commission. Since much of the material for the future Guide was to be found in the report of the current session of the Commission and other travaux préparatoires, the Commission requested the Secretariat to prepare a final version of the Guide to Enactment, reflecting the deliberations and decisions at the current session. The Commission mandated the publication of the final version of the Guide to be prepared by the Secretariat together with the text of the Model Law, as a single document.

6. Adoption of the Model Law and recommendation

221. Upon concluding its deliberations on the Model Law, the Commission adopted the following decision at its 630th meeting, on 30 May 1997:

"The United Nations Commission on International Trade Law,

"Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 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, and in particular those of developing countries, in the extensive development of international trade,

"Noting that increased cross-border trade and investment leads to greater incidence of cases where enterprises and individuals have assets in more than one State,

"Noting also that when a debtor with assets in more than one State becomes subject to an insolvency proceeding, there often exists an urgent need for cross-border cooperation and coordination in the supervision and administration of the insolvent debtor’s assets and affairs,

"Considering that inadequate coordination and cooperation in cases of cross-border insolvency reduce the possibility of rescuing financially troubled but viable businesses, impede a fair and efficient administration of cross-border insolvencies, make it more likely that the debtor’s assets would be concealed or dissipated, and hinder reorganizations or liquidations of debtors’ assets and affairs that would be the most advantageous for the creditors and other interested persons, including the debtors and the debtors’ employees,

"Noting further that many States lack a legislative framework that would make possible or facilitate effective cross-border coordination and cooperation,

"Being convinced that fair and internationally harmonized legislation on cross-border insolvency that respects the national procedural and judicial systems and is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

"Considering that a set of internationally harmonized model legislative provisions on cross-border insolvency is needed to assist States in modernizing their legislation governing cross-border insolvency,

"1. Adopts the UNCITRAL Model Law on Cross-Border Insolvency;

"2. Requests the Secretary-General to transmit the text of the UNCITRAL Model Law on Cross-Border Insolvency, together with the Guide to Enactment of the Model Law prepared by the Secretariat, to Governments and other interested bodies;

"3. Recommends that all States review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and that, in that review, give favourable consideration to the UNCITRAL Model Law on Cross-Border Insolvency, bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency."

222. The Commission expressed its appreciation to the International Association of Insolvency Practitioners (INSOL) for its expert advice provided during all stages of the preparatory work and for co-organizing the first UNCITRAL-INSOL Colloquium on Cross-Border Insolvency and the subsequent two UNCITRAL-INSOL Judicial Colloquia on the work of the Commission in this area. The Commission also expressed its appreciation to Committee J (Insolvency) of the Section on Business Law of the International Bar Association for its active consultative assistance during the preparation of the Model Law. The Commission was also appreciative of the suggestions given to the Secretariat during the preparatory work by the Commission on International Bankruptcy Law of the International Association of Lawyers.

7. Future work

223. The Commission heard the proposal that, having completed the work on model legislation, it should prepare model provisions for an international treaty, bilateral or multilateral, on judicial cooperation and assistance in cross-border insolvency or a full-fledged treaty on those matters. It was recalled that such work had been mentioned as a possibility at the twentieth session of the Working Group on Insolvency Law (A/CN.9/433, paras. 16-20). In addition to that proposal, various other topics were mentioned with respect to which it might be worthwhile to explore the desirability and feasibility of work at the international level; these were: legislative treatment of cross-border insolvency in the banking and financial services sector, preparation of model agreements or practices for cross-border cooperation in reorganizations of insolvent enterprises, conflict-of-laws solutions in cross-border insolvency cases, and the effects of insolvency proceedings on arbitration agreements and arbitral proceedings.
224. After discussion, the Commission adopted the view that it would be preferable, before deciding whether to undertake work towards a treaty or to deal with any other topic mentioned, to evaluate the impact of, and the experience with, the Model Law and to await the results of similar work in other international forums, such as the European Union, and possibly the Organization of American States. In the meantime, the Secretariat was requested to monitor the developments in that field and to formulate suggestions for a future session of the Commission as to the desirability and feasibility of any such work.

225. During the final considerations of the Model Law, it was proposed, and the Commission agreed with the proposal, that the Secretariat should collect information on the enactment of the Model Law in various States, and, in cooperation with relevant organizations that had the expertise in the area, to monitor the developing practices, experience and issues that would emerge from the use of national laws based on the Model Law. The holding of judicial colloquiums, which had been convened during the preparatory work towards the Model Law (see paragraphs 12 and 17, above), was mentioned as one possible method for such evaluation work.

### III. PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

#### A. Background

226. At its twenty-ninth session, in 1996, the Commission decided to prepare a legislative guide on build-operate-transfer (BOT) and related types of projects. The Commission reached the decision after deliberations by many States and consideration of a report prepared by the Deputy Secretary-General (A/NCN.9/424) which contained information on work then being undertaken by other organizations in that field, as well as an outline of issues covered by relevant national laws.

227. It was reported that, unlike traditional publicly funded projects, in which the Government was responsible for the entire implementation of the project, including for obtaining financing and guaranteeing its repayment, in the case of privately financed infrastructure projects the Government engaged a private entity to develop, maintain and operate an infrastructure facility in exchange for the payment of a price, either to the public or to the Government for the use of the facility or the services or goods it generated.

228. In its deliberations, the Commission noted the interest that various forms of private participation in public infrastructure projects had raised in many States, in particular in developing countries, as the successful implementation of such projects would enable States to achieve significant savings in public expenditure and to reorganize the resources that otherwise would have been invested in infrastructure in order to meet more pressing social needs. Furthermore, since those projects were built and, during the concession period, operated by the project company, the country benefited from private sector expertise in operating and managing the relevant infrastructure facility. The Government might expect in particular to achieve efficiency gains and high standards of service, which sometimes might not be provided by State monopolies.

229. It was noted, however, that the implementation of privately financed infrastructure projects required a favourable legal framework that fostered the confidence of potential investors, national and foreign, while protecting public interests. Thus, the Commission considered that it would be useful to provide specific guidance to States preparing or modernizing legislation relevant to those projects. The Commission requested the Secretariat to review issues suitable for being dealt with in a legislative guide and to prepare draft materials for consideration by the Commission.

230. At its thirtieth session, the Commission had before it a table of contents setting out the topics proposed to be covered by the legislative guide, which were followed by annotations in some detail concerning the issues suggested to be discussed therein (A/NCN.9/438). The Commission further had before it initial drafts of chapter I, “Scope, purpose and terminology of the Guide” (A/NCN.9/438/Add.1), chapter II, “Parties and phases of privately financed infrastructure projects” (A/NCN.9/438/Add.2) and chapter V, “Preparatory measures” (A/NCN.9/438/Add.3).

#### B. General remarks

231. It was pointed out that the annotated table of contents contained in document A/NCN.9/438 had been prepared by the Secretariat for the purpose of enabling the Commission to make an informed decision on the proposed structure of the draft legislative guide and its contents. The Commission was informed that, in preparing the draft materials, the Secretariat had borne in mind the need to keep the appropriate balance between the objective of attracting private investment for infrastructure projects and the protection of the interests of the host Government and the users of the infrastructure facility.

232. The Commission noted the proposal that the draft legislative guide should consider which aspects of the issues mentioned in document A/NCN.9/438 should be dealt with in legislation, while leaving others to be addressed by the parties in the agreements concerning the implementation of the project.

233. The Commission expressed its satisfaction at the commencement of the work towards the preparation of a legislative guide on privately financed infrastructure projects. It was stated that the legislative guide would, upon completion, constitute a useful tool for Governments in reviewing and modernizing their legislation pertaining to those projects. In that connection, it was observed that many Governments, but also international organizations and private entities, had expressed keen interest in the work of the Commission concerning those projects. It was
generally felt that the documents submitted by the Secretariat presented a good basis for the work of the Commission in that field.

C. Structure of the draft legislative guide and issues to be covered

234. The Commission engaged in a general discussion on the proposed structure of the draft legislative guide, as set out in document A/CN.9/438, and on the issues suggested to be discussed therein, so as to allow the Secretariat to prepare the remaining draft chapters of the legislative guide.

235. The Commission exchanged views on the nature of the issues to be discussed in the draft legislative guide and possible methods for addressing them. It was noted that, in dealing with individual topics, the draft legislative guide should distinguish among the following categories of issues: general legal issues under the laws of the host country; issues relating to legislation specific to privately financed infrastructure projects; issues that might be dealt with at the regulatory level; and issues of a contractual nature. Although a clear distinction might not always be feasible, it was noted that the draft legislative guide should focus primarily on issues relating to legislation specific to, or of particular importance for, privately financed infrastructure projects. Regarding the drafting techniques that might be used in the preparation of the draft legislative guide, interventions were made pointing out the usefulness of sample provisions for the purpose of illustrating possible legislative solutions for the issues dealt with in the guide. It was suggested that the draft legislative guide should take into consideration and discuss, as appropriate, the cost implications of possible solutions for particular issues.

236. As a general comment on the subject matters to be covered by the draft legislative guide, it was pointed out that infrastructure projects increasingly involved the combined participation of public authorities and private sector entities. It was felt to be important to ensure that the draft legislative guide would adequately reflect that development. Furthermore, it was pointed out that governmental decisions to invite private participation in infrastructure projects might result from the consideration of a number of factors, not limited to the objective of reducing public expenditure. It was noted that issues pertaining to privately financed infrastructure projects involved also issues of market structure and market regulation and that consideration of those issues was important for the treatment of a number of individual topics proposed to be covered by the guide. For instance, issues of sector structure, such as the level of competition the host Government wished to promote in the sector concerned, would affect a governmental decision as to whether to grant exclusivity to one concessionaire or whether to award multiple concessions. Similarly, issues of sector regulation, such as whether prices and quality of services should be established by the project company or by a regulatory agency, would be crucial for establishing an appropriate regulatory mechanism.

237. Several proposals were made concerning the contents of future chapters of the legislative guide. In particular, the Secretariat was requested:

(a) To elaborate, in chapter III (A/CN.9/438, paras. 6-16), on the different legal regimes governing the infrastructure in question, as well as on the services provided by the project company, issues in which there were significant differences among legal systems. Particular attention should be given to constitutional issues relating to privately financed infrastructure projects and the role of sector-specific regulation, as well as commercial finance legislation and legislation on special corporate entities;

(b) To emphasize, in chapter IV (A/CN.9/438, paras. 17-26), that the appropriateness of the selection procedure, or the need to resort to any such procedure, depended not only on the nature of each individual project, but also on the policy pursued by the Government for the sector concerned and the extent to which the Government wanted that sector to be subject to free competition. It was also suggested that the draft legislative guide should discuss issues raised by unsolicited proposals;

(c) To emphasize, in chapter VI (A/CN.9/438, paras. 29-38), the obligations of the project company to transfer technology and to highlight the interests of the host Government in developing the skills of local personnel. It was also suggested to consider issues relating to competition policy and possible monopoly in the provision of services;

(d) To consider, in chapter VII (A/CN.9/438, paras. 39-45), possible manners in which privately financed infrastructure projects could be facilitated with a minimum involvement of governmental guarantees. With regard to forms of governmental support to infrastructure projects, it was suggested that the draft legislative guide should give attention to specific forms of governmental support, such as facilitation of entry visas and work permits; waiver of immigration or repatriation restrictions for foreign personnel; waiver of currency exchange restrictions;

(e) To consider, in chapter X (A/CN.9/438, paras. 67-73), the desirability and appropriateness of dealing with performance issues in legislation specific to privately financed infrastructure projects;

(f) To give particular attention, in chapter XI (A/CN.9/438, paras. 74-83), to questions such as ownership of infrastructure and related property; responsibility for residual liabilities of the project company; terms of transfer of the infrastructure to the host Government in BOT projects. Attention should also be given to cases where the host Government might decide to keep the infrastructure permanently under operation by private sector entities;

(g) To elaborate, in chapter XII (A/CN.9/438, paras. 84-87) and chapter XIII (A/CN.9/438, paras. 88-92), on the possibility for, and the limitations of, choice-of-law clauses and arbitration agreements, taking into account the specific nature of the various contractual arrangements involved, emphasizing the role of choice-of-law clauses in the contracts between the project company and its suppliers and other contractors. It was also suggested to further consider the desirability for the parties to make use of commercial law rules elaborated by international bodies.
D. Consideration of draft chapters

Chapter I. Scope, purpose and terminology of the Guide (A/CN.9/438/Add.1)

238. As a general comment, it was suggested that the guide should avoid the impression that it only dealt with infrastructure projects that were exclusively financed with private funds or through the "project finance" modality. It was further suggested that the draft legislative guide should stress the role that local capital providers and investors might play in the development of infrastructure projects.

239. Following that same line of thought, it was suggested that chapter I should make it clear that infrastructure projects could also be carried out by entities in which the host government participated. There was general agreement that the draft legislative guide should also expressly cover those entities, as long as they were subject to substantially the same legal regime, and operated under essentially the same rules, that applied to the operations of private entities.

240. Support was expressed for not dealing with transactions for the "privatization" of State property by means of the sale of State property or shares of State-owned entities to the private sector. However, it was suggested that the draft legislative guide should follow a flexible approach and that it should not exclude transactions whereby the State transferred to the private sector the ownership of State-owned entities entrusted with the provision of some form of public service, a process sometimes referred to as "divestiture".

241. It was pointed out that in some projects, such as construction and operation of power generation plants, the project company might be granted the right to exploit some natural resources, for instance as an ancillary activity, or for the purpose of producing fuel necessary for the operation of the concession. It was suggested that the draft legislative guide should not exclude transactions of that type, as long as the concession to exploit natural resources was only ancillary to a main infrastructure project.

Chapter II. Parties and phases of privately financed infrastructure projects (A/CN.9/438/Add.2)

242. As an introduction to privately financed infrastructure projects, draft chapter II contained general remarks on the concept of project finance, the parties to a privately financed infrastructure project and the phases of its implementation. It was noted that the purpose of draft chapter II was to provide the reader with background information and to facilitate making an informed choice of possible legislative solutions for the issues subsequently discussed in the draft legislative guide.

243. As a general comment on draft chapter II, it was suggested that more emphasis should be given therein to the implications of internal approval and licensing requirements of the host government and the need for coordinating all agencies involved. Furthermore, it was suggested that the draft legislative guide should point out the legal risks faced by prospective concessionaires during the precontractual phase (e.g. unsuccessful negotiations, subsequent avoidance of the contract) and the need to reduce those risks. It was also suggested that chapter II of the draft legislative guide should consider issues that might arise in connection with the renegotiation of the terms of the concession or as a result of its transfer to another concessionaire.

Chapter V. Preparatory measures (A/CN.9/438/Add.3)

244. It was proposed to discuss in chapter V a few important preparatory steps for the implementation of the project: the acquisition of land for the construction of the facility, including access to the project site; the establishment of the consortium or company that would be granted the concession to build and operate the infrastructure facility; the issuance of licences and approvals necessary for carrying out the project activities and suitable arrangements for ensuring the coordination among governmental entities concerned.

245. It was suggested that chapter V should consider the extent to which national legislation could adequately address those issues without depriving the parties of the flexibility necessary for meeting the needs of individual projects. With regard to the acquisition of a site for the project company, it was suggested to give attention in the draft chapter to the position and interests of the owners of property that might be expropriated for the purpose of building the infrastructure.

246. In connection with the legal form that might be assumed by the project company, it was proposed that the draft legislative guide should follow a flexible approach, so as not to discourage possible new and advantageous mechanisms of business cooperation.

E. Future work

247. Subject to the deliberations reflected above, the Commission generally approved the line of work proposed by the Secretariat, as contained in documents A/CN.9/438 and Add.1-3. The Commission requested the Secretariat to seek the assistance of outside experts, as required, in the preparation of future chapters to be considered by the Commission at its thirty-first session, in 1998. The Commission invited Governments to identify experts who could be of assistance to the Secretariat in that task.

IV. ELECTRONIC COMMERCE

248. It was recalled that the Commission, at its twenty-ninth session, decided to place the issues of digital signatures and certification authorities on its agenda. The Working Group on Electronic Commerce was requested to examine the desirability and feasibility of preparing uniform rules on those topics. It had been agreed that work to be carried out by the Working Group at its thirty-first
session could involve the preparation of draft rules on certain aspects of the above-mentioned topics. The Working Group had been requested to provide the Commission with sufficient elements for an informed decision to be made as to the scope of the uniform rules to be prepared. As to a more precise mandate for the Working Group, it had been agreed that the uniform rules to be prepared should deal with such issues as: the legal basis supporting certification processes, including emerging digital authentication and certification technologies; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use of certification techniques; the specific issues of certification through the use of registries; and incorporation by reference.

249. The Commission had before it the report of the Working Group on the work of its thirty-first session (A/ CN.9/437). As to the desirability and feasibility of preparing uniform rules on issues of digital signatures and certification authorities, the Working Group indicated to the Commission that it had reached consensus as to the importance of, and the need for, working towards harmonization of law in that area. While it had not made a firm decision as to the form and content of such work, it had come to the preliminary conclusion that it was feasible to undertake the preparation of draft uniform rules at least on issues of digital signatures and certification authorities, and possibly on related matters. The Working Group recalled that, alongside digital signatures and certification authorities, future work in the area of electronic commerce might also need to address: issues of technical alternatives to public-key cryptography; general issues of functions performed by third-party service providers; and electronic contracting (A/ CN.9/437, paras. 156-157). With respect to the issue of incorporation by reference, the Working Group concluded that no further study by the Secretariat was needed, since the fundamental issues were well known and it was clear that many aspects of battle-of-forms and adhesion contracts would need to be left to applicable national laws for reasons involving, for example, consumer protection and other public-policy considerations. The Working Group was of the opinion that the issue should be dealt with as the first substantive item on its agenda, at the beginning of its next session (A/ CN.9/437, para. 155).

250. The Commission expressed its appreciation for the work already accomplished by the Working Group at its thirty-first session, endorsed the conclusions reached by the Working Group, and entrusted the Working Group with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. With respect to the exact scope and form of such uniform rules, it was generally agreed that no decision could be made at such an early stage of the process. It was felt that, while the Working Group might appropriately focus its attention on the issues of digital signatures in view of the apparently predominant role played by public-key cryptography in the emerging electronic-commerce practice, the uniform rules to be prepared should be consistent with the media-neutral approach taken in the UNCITRAL Model Law on Electronic Commerce. Thus, the uniform rules should not discourage the use of other authentication techniques. Moreover, in dealing with public-key cryptography, those uniform rules might need to accommodate various levels of security and to recognize the various legal effects and levels of liability corresponding to the various types of services being provided in the context of digital signatures. With respect to certification authorities, while the value of market-driven standards was recognized by the Commission, it was widely felt that the Working Group might appropriately envisage the establishment of a minimum set of standards to be met by certification authorities, particularly where cross-border certification was sought.

251. As an additional item to be considered in the context of future work in the area of electronic commerce, it was suggested that the Working Group might need to discuss, at a later stage, the issues of jurisdiction, applicable law and dispute settlement on the Internet. The Commission was informed that a colloquium on the issues of jurisdiction and applicable law on the Internet would take place in June 1997 under the auspices of the Hague Conference on Private International Law. The Commission was also informed that an international conference convened by the Organisation for Economic Cooperation and Development in November 1997 would attempt to develop a coordinated approach to the issues of electronic commerce among interested Governments, intergovernmental organizations, nongovernmental organizations and private sector groups. The Commission expressed the hope that those two events could be attended and reported upon by the Secretariat.

V. ASSIGNMENT IN RECEIVABLES FINANCING

252. It was recalled that the Commission had discussed legal issues in the area of assignment of claims at its twenty-sixth session, in 1993, at its twenty-seventh session, in 1994, and at its twenty-eighth session, in 1995, and had entrusted, at its twenty-eighth session, the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing.

253. The Working Group commenced its work at its twenty-fourth session, held at Vienna from 13 to 24 November 1995 (A/CN.9/420), and continued at its twenty-fifth session, held in New York from 8 to 19 July 1996 (A/ CN.9/432), and at its twenty-sixth session, held at Vienna from 11 to 12 November 1996 (A/CN.9/434). It was noted that, at its twenty-fifth session, the Working Group had decided to proceed with its work on the assumption that the text being prepared would take the form of a convention (A/CN.9/432, para. 28). On the basis of the considerations of the Working Group at its twenty-sixth session, the Secretariat prepared a revised version of the draft Convention on Assignment in Receivables Financing (A/CN.9/WG.II/ WP.93).

Ibid., Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374- 381.
254. At the present session, the Commission had before it the reports on the twenty-fifth and twenty-sixth sessions of the Working Group (A/CN.9/432 and A/CN.9/434). It was noted that the Working Group had reached agreement in principle on a number of issues, including the validity of bulk assignments of present and future receivables, the time of transfer of receivables, no-assignment clauses, representations of the assignor and protection of the debtor. In addition, it was noted that the main outstanding issues included effects of the assignment on third parties, i.e. creditors of the assignor and the administrator in the insolvency of the assignor, as well as scope and conflict-of-laws issues.

255. While the effects of the assignment on third parties were said to be a difficult matter to achieve consensus on, interest was expressed in the proposal by the Secretariat contained in the revised articles of the draft Convention (A/CN.9/WG.III/ WP.93) allowing States to choose by way of a declaration between a substantive rule based on the time of assignment or a conflict-of-laws rule, and a rule based on the time of registration, which would take effect only upon establishment of a suitable registration system. A number of suggestions were made, including: that the scope of application of the draft Convention should be limited to the assignment of contractual receivables for financing purposes; and that the conflict-of-laws issues should be addressed in cooperation with the Hague Conference on Private International Law, taking into account the commercial character of the transactions covered and the needs of the parties involved.

256. The Commission noted that the draft Convention had aroused the interest of the receivables financing community and Governments, since it had the potential of increasing the availability of credit at more affordable rates. Therefore, the Commission expressed the hope that the Working Group would proceed with its work expeditiously, so that after three more sessions, scheduled to take place at Vienna from 20 to 31 October 1997, in New York from 2 to 13 March 1998 and at Vienna in the autumn of 1998, the Working Group would be able to submit the draft Convention for consideration by the Commission at its thirty-second session, in 1999.

VI. MONITORING IMPLEMENTATION OF THE 1958 NEW YORK CONVENTION

257. It was recalled that the Commission, at its twenty-eighth session in 1995, had approved the project, undertaken jointly with Committee D of the International Bar Association, aimed at monitoring the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Stressing that the purpose of the project was not to monitor individual court decisions applying the Convention, 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. In November 1995, the Secretariat sent to the States parties a questionnaire relating to the legal regime governing the recognition and enforcement of foreign awards, prepared in cooperation with Committee D of the International Bar Association. Subsequent to that date, the Secretariat repeated its request to the States parties for the relevant information.

258. The Commission heard a progress report on that project. The Secretariat reported that, while 112 States were contracting parties to the 1958 New York Convention, it had received only 40 replies to the questionnaire. The Commission called upon the States parties to the Convention that had not yet replied to the questionnaire of the Secretariat to do so. The Secretariat was requested to prepare a note presenting the findings based on the analysis of the information gathered.

259. It was pointed out that, at the forthcoming session of the Commission, special commemorative meetings would be devoted to issues of arbitration on 10 June 1998, to celebrate the fortieth anniversary of the 1958 New York Convention. On that occasion, in addition to speeches pronounced by former participants in the diplomatic conference that had adopted the 1958 New York Convention, the Commission would hear a report on the Congress of the International Council for Commercial Arbitration, to be held in Paris from 3 to 6 May 1998. Also envisaged was a discussion of possible work towards a new convention or possible additions to the UNCITRAL Model Law on International Commercial Arbitration. Triggered by the initiative of the Working Party on International Contract Practices in Industry (WP.5) of the Economic Commission for Europe to undertake a limited revision of the European Convention on International Commercial Arbitration (Geneva, 1961), it was suggested that, on the occasion of both the anniversary of the 1958 New York Convention and the possible revision of the 1961 Geneva Convention, consideration might be given to providing the most useful features of the 1961 Geneva Convention to a universal membership while introducing, at the same time, a number of additions to the 1958 New York Convention (without touching that Convention itself), for example, concerning written form requirements, interim measures of protection, and court assistance for the taking of evidence. It was generally agreed that the suggestion was a very interesting one that deserved in-depth consideration.

VII. CASE LAW ON UNCITRAL TEXTS (CLOUT)


22Ibid., paras. 401-404.

23Ibid., Forty-Fifth Session, Supplement No. 17 (A/45017), annex 1.

261. The Commission also noted with appreciation that a search engine had been placed on the website of UNCITRAL on the Internet (http://www.un.or.at/uncitrals) to enable CLOUT users to effectuate a search into CLOUT cases and other documents. A demonstration of the search engine was provided to the Commission. The Secretariat was encouraged to continue its efforts to increase the availability of UNCITRAL documents through the Internet.

262. The Commission expressed its appreciation to the national correspondents 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 pointed out that, as the number of cases being prepared for inclusion in the CLOUT collection increased, it was of vital importance that the abstracts submitted by national correspondents be of such quality that they would not require heavy editing by the Secretariat. The Commission emphasized the importance of CLOUT for the purpose of promoting the uniform application of the legal texts that resulted from its work. The Commission noted that, by being issued in the six official languages of the United Nations, CLOUT constituted an invaluable tool for practitioners, academics and government officials. The Commission urged every State that had not yet appointed a national correspondent to do so.

263. The Commission noted also that the work of the Secretariat in editing abstracts, storing decisions and awards in their original form, translating abstracts into the other five official languages of the United Nations, publishing them in the six official languages of the United Nations, forwarding abstracts and full texts of decisions and awards to interested parties upon request and establishing and operating the CLOUT search engine had substantially increased with the increasing number of decisions and awards covered by CLOUT. The Commission therefore requested that adequate resources be made available to the Secretariat for the effective operation of CLOUT.

VIII. TRAINING AND ASSISTANCE

264. The Commission had before it a note by the Secretariat (A/CN.9/439) outlining the activities that had taken place since its twenty-ninth session and indicating the direction of future activities being planned. It was noted that UNCITRAL seminars and briefing missions for government officials were designed to explain the salient features and utility of international trade law instruments of UNCITRAL.

265. It was reported that, since the twenty-ninth session, seminars and briefing missions had taken place at Bridgetown (regional seminar) from 23 to 26 April 1996, at Hanoi on 31 August 1996, at Vientiane from 3 to 6 September 1996, at Bangkok from 9 to 10 September 1996, at Kuala Lumpur from 5 to 6 November 1996, at Cairo from 2 to 5 December 1996 and at Pretoria from 2 to March 1997. The Secretariat reported that for the remainder of 1997 and up to the thirty-first session of the Commission, in June 1998, seminars and legal-assistance briefing missions were being planned in Africa, Asia, Latin America and eastern Europe.

266. The Commission expressed its appreciation to the Secretariat for the activities undertaken since its twenty-ninth session and emphasized the importance of the training and technical assistance programme for promoting awareness of its work and disseminating information on the legal texts it had produced. It was pointed out that seminars and briefing missions were particularly useful for developing countries lacking expertise in the areas of trade and commercial law covered by the work of UNCITRAL. The Commission noted the relevance of uniform commercial law, in particular legal texts prepared by UNCITRAL, in the economic integration efforts being undertaken by many countries and emphasized the important role that the training and technical assistance activities of the Secretariat might play in that context. As for the topics covered in UNCITRAL seminars, the Secretariat was encouraged to include, whenever appropriate, information on texts relevant to international trade prepared by other organizations.

267. The Commission noted the various forms of technical assistance that might be provided by the Secretariat, such as review of preparatory drafts of legislation, 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. The Commission encouraged the Secretariat to devise ways to address the continuing and significant increase in the importance being attributed by Governments, by domestic and international business communities and by multilateral and bilateral aid agencies to improving the legal framework for international trade and investment.

268. The Commission emphasized the importance of cooperation and coordination between development assistance agencies providing or financing legal technical assistance with the Secretariat, with a view to avoiding situations in which international assistance might lead to the adoption of national laws that would not represent internationally agreed standards, including UNCITRAL conventions and model laws.

269. The Commission took note with appreciation of the contributions for the seminar programme that had been made by Switzerland. The Commission also expressed its appreciation to those other States and organizations that had contributed to the Commission’s programme of training and assistance by hosting seminars. Stressing the importance of extrabudgetary funding for carrying out training and technical assistance activities, the Commission appealed once more to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, particularly in the form of multi-year contributions, so as to facilitate planning and enable the Secretariat to meet the increasing demands in developing countries and newly independent States for training and assistance.

270. At its twenty-ninth session, the Commission had noted that the General Assembly had not had the opportunity, during its fiftieth session, to consider the request made by the Commission at its twenty-eighth session that the UNCITRAL Trust Fund for Symposia 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 obligations of a State to pay its assessed contribution to the Organization. Accordingly, the Commission had requested that the Sixth Committee recommend to the General Assembly the adoption of a resolution including the UNCTRAL Trust Fund for Symposia and the Trust Fund for Granting Travel Assistance to Developing States Members of UNCTRAL on the agenda of the United Nations Pledging Conference for Development Activities.

271. The General Assembly, in its resolution 51/161, paragraph 11, of 16 December 1996, had decided to include the trust funds for symposia and travel assistance in the list of funds and programmes that were to be dealt with at the United Nations Pledging Conference for Development Activities. The Commission noted with appreciation that decision.

IX. STATUS AND PROMOTION OF UNCTRAL TEXTS

272. The Commission, on the basis of a note by the Secretariat (A/50/440), considered the status of the conventions and model laws emanating from its work, as well as the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Commission noted with pleasure the new actions of States after 14 June 1996 (date of the conclusion of the twenty-ninth session of the Commission) regarding the following instruments:


(j) UNCTRAL Model Law on Procurement of Goods, Construction and Services (1994);

(k) UNCTRAL Model Law on Electronic Commerce (1996);


273. Appreciation was expressed for those legislative actions on the texts of the Commission. In the context of the discussion of the status of the United Nations Sales Convention, a suggestion was made that it might be appropriate for the Commission to examine in the future whether the principles underlying that Convention might be considered for general application to international commercial contracts, i.e. beyond the sales contract. The Commission took note of the suggestion.

274. It was noted that, despite the universal relevance and usefulness of those texts, a great number of States had not yet enacted any of them. In view of the broad support for the legislative texts emanating from the work of the Commission among practitioners and academics in countries with different legal, social and economic systems, the pace of adoption of those texts was slower than it needed to be. An appeal was directed to the delegates and observers participating in the meetings of the Commission and its working groups to engage themselves, to the extent they in their discretion deemed appropriate, in facilitating consideration by legislative organs in their countries of texts of the Commission.

275. In connection with the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, it was stated that draft International Standby Practices were available for comments by States, and that they were intended to be compatible with the Convention.

X. GENERAL ASSEMBLY RESOLUTIONS ON THE WORK OF THE COMMISSION

276. The Commission took note with appreciation of General Assembly resolution 51/162 of 16 December 1996, in which the Assembly had expressed its appreciation to
the Commission for completing and adopting the UNCITRAL Model Law on Electronic Commerce and for preparing the Guide to Enactment of the Model Law. In paragraph 2 of the resolution, the General Assembly had recommended that, in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information, all States should give favourable consideration to the Model Law when they enacted or revised their laws.

277. The Commission took note with appreciation of General Assembly resolution 51/161, on the report of the Commission on its twenty-ninth session, held in 1996. In particular, it was noted that, in paragraph 6 of the resolution, the Assembly had reaffirmed the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in that field and, in that connection: had called upon all bodies of the United Nations system and had invited other international organizations to bear in mind the mandate of the Commission and the need to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law; and had recommended that the Commission, through its secretariat, should continue to maintain close cooperation with the other international organs and organizations, including regional organizations as well as other bodies such as the International Institute for the Unification of Private Law, which were active in the field of international trade law and other related areas.

278. The Commission further noted with appreciation that the General Assembly, in resolution 51/161, paragraph 7, had reaffirmed the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission, and that, in paragraph 8 of the resolution, the Assembly had expressed the desirability for increased efforts by the Commission, in sponsoring seminars and symposia, to provide such training and assistance.

279. The Commission also noted with appreciation that the General Assembly, in resolution 51/161, paragraph 8(b), had appealed to Governments, the relevant United Nations organs, organizations and institutions and individuals to make voluntary contributions to the UNCITRAL trust fund for symposia and, where appropriate, to the financing of special projects. Furthermore, it was noted that the Assembly, in paragraph 9 of the resolution, had appealed 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.

280. It was also appreciated that the General Assembly, in resolution 51/161, paragraph 10, had appealed 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 granting travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General. That trust fund had been established pursuant to Assembly resolution 48/32 of 9 December 1993. As indicated above (see paragraph 271), the Commission noted with appreciation that the Assembly, in resolution 51/161, paragraph 11, had decided to include the UNCITRAL trust fund for symposia and the trust fund for granting travel assistance to developing countries that are members of the Commission in the list of funds and programmes that were dealt with at the United Nations Pledging Conference for Development Activities. The Commission also noted with appreciation that the Assembly, in resolution 51/161, paragraph 12, had decided to continue its consideration in the competent Main Committee during the fifty-first session of the Assembly of the question of granting travel assistance to the least developed countries that were members of the Commission, at their request and in consultation with the Secretary-General.

281. The Commission welcomed the request by the General Assembly to the Secretary-General, in paragraph 13 of resolution 51/161, to ensure that adequate resources were 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 demand for training and assistance.

282. The Commission also noted with appreciation that the General Assembly, in resolution 51/161, paragraph 14, had stressed the importance of bringing into effect the conventions emanating from the work of the Commission and, to that end, had urged States that had not yet done so to consider signing, ratifying or acceding to those conventions.

XI. OTHER BUSINESS

A. Efficiency review

283. It was reported that, in a note verbale dated 14 October 1996, the Secretariat had, as part of the efficiency review of its working methods, invited all States to name national institutions particularly interested in receiving documents and information from it, any research facilities that might be interested in cooperating in specific projects, and law reform commissions, bilateral aid agencies or other bodies involved in law reform projects. It was noted that only 11 States had replied to that questionnaire, and an appeal was made to all other States to assist the Secretariat in those laudable efforts by submitting their replies soon.

284. On the occasion of the ceremony for the thirtieth anniversary of UNCITRAL, hosted by the Federal Ministry of Justice of Austria, it was noted that a private foundation had been established to encourage assistance to UNCITRAL from the private sector. States were invited to nominate persons to work with the foundation.
285. The Commission reiterated the importance of maintaining high standards of quality and accuracy in the translation of UNCITRAL documents into all the official languages of the United Nations. The Commission expressed concern that the translation of documents into some of the official languages was sometimes delayed, thus affecting the work of some delegations. The Commission urged the Secretary-General to make sufficient resources available for the translation of UNCITRAL documents.

B. Bibliography


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

C. Willem C. Vis International Commercial Arbitration Moot

288. It was reported to the Commission that the Institute of International Commercial Law at the Pace University School of Law, in New York, had organized the fourth Willem C. Vis International Commercial Arbitration Moot at Vienna from 1 to 6 April 1997. 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 and the UNCITRAL Model Law on International Commercial Arbitration. In the 1997 Moot, 48 teams participated from law schools from 19 countries. The fifth Moot would be held at Vienna from 4 to 9 April 1998.

289. 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.

D. Date and place of the thirty-first session of the Commission

290. It was decided that the Commission would hold its thirty-first session from 1 to 12 June 1998 in New York.

E. Sessions of working groups

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


(b) The Working Group on Electronic Commerce would hold its thirty-second session from 19 to 30 January 1998 at Vienna.

ANNEX I

UNCITRAL Model Law on Cross-Border Insolvency

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

ANNEX II

List of documents before the Commission at its thirtieth session

[Annex II is reproduced in part three, V of this Yearbook.]

B. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board (Forty-fourth session) (TD/B/44/19 (Vol. I)*

"I.F. (Agenda item 7) (b) Progressive development of the law of international trade: thirtieth annual report of the United Nations Commission on International Trade Law

At its 889th plenary meeting, on 21 October 1997, the Trade and Development Board took note of the report of the UNCITRAL on the work of its thirtieth session and agreed to the proposals made by the Senior Legal Adviser, according to which:

(a) The head of the UNCITRAL secretariat would be invited to present the annual report of UNCITRAL to the Board in 1998 and to provide delegations with any information that they might require on the work of UNCITRAL;

(b) UNCITRAL would be invited to participate in the second session of the Commission on Enterprise, Business Facilitation and Development, to be held in Geneva from 1 to 5 December 1997;

(c) The UNCTAD secretariat would invite UNCITRAL to participate in the symposium on Partners for Development, which the Secretary-General of UNCTAD would convene in Lyon from 9 to 12 November 1998.

(d) The UNCTAD secretariat should monitor those projects of UNCITRAL that were relevant to the ongoing work of UNCTAD and inform the Board and its subsidiary bodies in that respect.


I. INTRODUCTION

1. At its 4th plenary meeting, on 19 September 1997, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its fifty-second session the item entitled “Report of the United Nations Commission on International Trade Law on the work of its thirtieth session” and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 3rd, 4th and 27th meetings, on 6 and 7 October and 13 November 1997. The views of the representatives who spoke during the Committee’s consideration of the item are reflected in the relevant summary records (A1C.6/52/SR.3, 4 and 27).

3. For its consideration of the item, the Committee had before it the report of the United Nations Commission on International Trade Law on the work of its thirtieth session.

4. At the 3rd meeting, on 6 October, the Chairman of the United Nations Commission on International Trade Law at its thirtieth session introduced the report of the Commission on the work of that session (see A/52/SR.3).

5. At the 4th meeting, on 7 October, the Chairman of the Commission made a concluding statement (see A/52/SR.4).

II. CONSIDERATION OF PROPOSALS


6. At the 27th meeting, on 13 November, the representative of Austria, on behalf of Argentina, Australia, Austria, Azerbaijan, Belgium, Botswana, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, the Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Greece, Guatemala, Hungary, Iceland, India, Israel, Italy, Jamaica, Kazakhstan, Kenya, Luxembourg, Malaysia, Mexico, Mongolia, Morocco, Myanmar, the Netherlands, Nigeria, Norway, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Thailand, the former Yugoslav Republic of Macedonia, Tunisia, Uganda, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay and Venezuela, introduced a draft resolution entitled “Report of the United Nations Commission on International Trade Law on the work of its thirtieth session” (A/C.6/52/L.6 and Corr.1) and orally revised it as follows: in operative paragraph 5, the word “Governments” was replaced with the word “States” and the words “from the private sector” were added at the end of the paragraph.

7. At the same meeting, the Committee adopted draft resolution A/C.6/52/L.6 and Corr.1, as orally revised, without a vote (see para. 10, draft resolution I).


8. At the 27th meeting, on 13 November, the representative of Austria, on behalf of Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Finland, Germany, Guatemala, Hungary, Iceland, Israel, Italy, Japan, Luxembourg, Mexico, the Netherlands, Norway, Portugal, Romania, Slovakia, South Africa, Spain, Sweden, Thailand, the former Yugoslav Republic of Macedonia, the United States of America, Uruguay and Venezuela, introduced a draft resolution entitled “Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law” (A/C.6/52/L.7 and Corr.1).

9. At the same meeting, the Committee adopted draft resolution A/C.6/52/L.7 and Corr.1 without a vote (see para. 10, draft resolution II).

III. RECOMMENDATIONS OF THE SIXTH COMMITTEE

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

[D. General Assembly resolutions 52/157 and 52/158 of 15 December 1997


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.

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

Stressing the value of participation by States at all levels of economic development and from different legal systems in the process of harmonizing and unifying international trade law,

Having considered the report of the Commission on the work of its thirtieth session,1

Mindful of the valuable contribution to be rendered by the Commission within the framework of the United Nations Decade of International Law, in particular as regards the dissemination of international trade law,

Concerned that activities undertaken by other bodies of the United Nations system in the field of international trade law without coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law, as stated in its resolution 37/106 of 16 December 1982.

Stressing the importance of the further development of the Case Law on United Nations Commission on International Trade Law Texts in promoting the uniform application of the legal texts of the Commission and its value for government officials, practitioners and academics,

1. Takes note with appreciation of the report of the United Nations Commission on International Trade Law on the work of its thirtieth session;2

2. Notes with satisfaction the completion and adoption by the Commission of the Model Law on Cross-Border Insolvency;3

3. Commends the Commission for the progress made in its work on receivables financing, digital signatures and certification authorities, privately financed infrastructure projects and the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards;4

4. Appeals to Governments that have not yet done so to reply to the questionnaire circulated by the Secretariat in relation to the legal regime governing the recognition and enforcement of foreign arbitral awards;

5. Invites States to nominate persons to work with the private foundation established to encourage assistance to the Commission from the private sector;

6. 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 and, in this connection:

(a) Calls upon all bodies of the United Nations system and invites other international organizations to bear in mind the mandate of the Commission and the need to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law;

(b) 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;

7. 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;

8. 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 Barbados, Egypt, the Lao People's Democratic Republic, Malaysia, South Africa, Thailand and Viet Nam;

(b) Expresses its appreciation to the Governments whose contributions enabled the seminars and briefing missions to take place, and appeals to Governments, the relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where appropriate, to the financing of special projects, and otherwise to assist the secretariat of the Commission in 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;

9. 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;

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

12. *Requests* the Secretary-General to ensure the effective implementation of the programme of the Commission;

13. *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.

*72nd plenary meeting*  
15 December 1997


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,

*Noting* that increased cross-border trade and investment leads to greater incidence of cases where enterprises and individuals have assets in more than one State,

*Noting also* that when a debtor with assets in more than one State becomes subject to an insolvency proceeding, there often exists an urgent need for cross-border cooperation and coordination in the supervision and administration of the insolvent debtor's assets and affairs,

*Considering* that inadequate coordination and cooperation in cases of cross-border insolvency reduce the possibility of rescuing financially troubled but viable businesses, impede a fair and efficient administration of cross-border insolvencies, make it more likely that the debtor's assets would be concealed or dissipated and hinder reorganizations or liquidations of debtors' assets and affairs that would be the most advantageous for the creditors and other interested persons, including the debtors and the debtors' employees,

*Noting* that many States lack a legislative framework that would make possible or facilitate effective cross-border coordination and cooperation,

*Convinced* that fair and internationally harmonized legislation on cross-border insolvency that respects the national procedural and judicial systems and is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment,

*Considering* that a set of internationally harmonized model legislative provisions on cross-border insolvency is needed to assist States in modernizing their legislation governing cross-border insolvency,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Cross-Border Insolvency contained in the annex to the present resolution;

2. *Requests* the Secretary-General to transmit the text of the Model Law, together with the Guide to Enactment of the Model Law prepared by the Secretariat, to Governments and interested bodies;

3. *Recommends* that all States review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and, in that review, give favourable consideration to the Model Law, bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency;

4. *Recommends also* that all efforts be made to ensure that the Model Law, together with the Guide, become generally known and available.

*72nd plenary meeting*  
15 December 1997

**ANNEX**

*Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law*

[The annex is reproduced in part three, 1 of this Yearbook.]
Part Two

STUDIES AND REPORTS
ON SPECIFIC SUBJECTS
# I. CROSS-BORDER INSOLVENCY

## A. Report of the Working Group on Insolvency Law on the work of its twentieth session (Vienna, 7-18 October 1996)

(A/CN.9/433) [Original: English]

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INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continued its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995) on the development of a legal instrument relating to cross-border insolvency. That was the third session that the Working Group devoted to the preparation of that instrument, tentatively entitled the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency.

2. The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century", held in New York in conjunction with the twenty-fifth session of the Commission, from 18 to 22 May 1992. The Commission decided at its twenty-sixth session in 1993 to pursue those suggestions further. Subsequently, in order to assess the desirability and feasibility of work in that area, and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders.

3. The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the Commission should, at least at the current stage, have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings. Subsequently, an international meeting of judges was held specifically to elicit their views as to work by the Commission in that area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22-23 March 1995)). The view of the participating judges and government officials concerned with insolvency was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

4. At its eighteenth session, the Working Group considered the possible issues to be covered in a legal instrument dealing with judicial cooperation and access and recognition in cross-border insolvency.
13. As the Working Group progressed with its consideration of document A/CN.9/WG.V/WP.46, it established an informal drafting group to revise the draft Model Legislative Provisions, reflecting the deliberations and decisions that had taken place. The Working Group expressed its appreciation to the drafting group for its work and, since there was no time to consider the texts prepared by the drafting group at the current session, decided to consider those texts at its twenty-first session, which would take place in New York from 20 to 31 January 1997. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in chapter II.

II. DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY

A. General remarks

14. It was considered that the draft Model Legislative Provisions before the Working Group reflected the general aims and principles that had so far guided the Working Group. It was hoped that those provisions would gain wide acceptance and that they would be taken into account by national legislators when revising their laws on insolvency.

15. The Working Group was reminded of the need for developing mechanisms that would represent an improvement in the way national laws currently dealt with the issues raised by cross-border insolvencies. Thus far the Working Group had aimed at achieving that result by means of a text that addressed the essential issues raised by cross-border insolvencies without being unnecessarily complex or ambitious.

Form of instrument

16. The Working Group also considered the question of the form of the instrument being prepared. It was noted that, as a working assumption, the draft text before the Working Group had been presented by the Secretariat in the form of model legislative provisions. Such a form, which would not preclude an eventual decision to transform the text into a draft convention, had taken into account the considerations that had been cited during the nineteenth session of Working Group in favour of model legislation.

17. However, arguments were raised in favour of the use of the form of a draft convention. It was considered that the form of a convention was more appropriate than the form of model legislative provisions for dealing with the issues in question, which concerned essentially international judicial cooperation. It was stated that such issues required a higher degree of uniformity, which could not be achieved by means of a model law, since States remained free to introduce substantive changes to its text, when implementing a model law. It was also pointed out that in some jurisdictions the cooperation with foreign judicial authorities was traditionally subject to the requirement of reciprocity. It was further stated that, while in the case of international conventions it could be easily proved that the requirement of reciprocity was satisfied, such proof would be more difficult in the case of model legislation. Moreover, it was said that in the field of cross-border insolvency, a convention might be more complex to elaborate than a model law, but it would be easier to implement.

18. In connection with the arguments that had been raised in favour of the form of a draft convention, it was suggested that the Working Group should consider the desirability of formulating model treaty provisions that could be offered to States wishing to enter into bilateral or multilateral agreements on judicial cooperation regarding cross-border insolvency. That would allow the Working Group to proceed with the consideration of the draft Model Legislative Provisions, without limiting its work to such a form.

19. In response it was considered that it would not be realistic for the Working Group, at the present stage, to venture into the formulation of a text other than model legislative provisions. In support of that view, it was stated that attempts at unification and harmonization of the subject which had been previously undertaken at a regional or international level, had had limited success. Furthermore, model legislative provisions constituted a less ambitious and more flexible instrument for legal harmonization and might, therefore, be more effective in a field where conventions had so far failed to achieve the desired objectives. As regards the question of reciprocity, it was pointed out that national laws often contemplated different notions of reciprocity so that no single solution could be easily provided, even in the form of a convention. In the case of model legislation, on the other hand, it would still be possible for those States which wished to do so, to subject its application to the rule of reciprocity, by listing those jurisdictions with regard to which the requirements of reciprocity had been fulfilled.

20. After considering the various views expressed, the Working Group decided to continue and complete its work on the draft Model Legislative Provisions. That would not exclude the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency, if the Commission at a later stage so decided.

B. Consideration of draft provisions

Preamble

21. The text of the preamble as considered by the Working Group read as follows:

"WHEREAS the [Government] [Parliament] of the enacting State considers it desirable to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) Fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested parties [whether or not resident, domiciled or with a registered office in the enacting State];"
“(b) Facilitating the gathering of information about the debtor’s assets and affairs, and protecting and maximizing the value of the debtor’s assets for the purposes of administering a cross-border insolvency;

“(c) Facilitating the rescue of financially troubled though viable businesses, thereby protecting investment and preserving employment;

“(d) Encouraging and providing a predictable environment for trade and investment in the enacting State; and

“(e) Furthering cooperation between the courts and other competent authorities of States affected by cases of cross-border insolvency.

“Be it therefore enacted as follows.”

22. It was decided to move subparagraphs (d) and (e) to the beginning of the preamble and reverse their order since it was considered that they contained more general statements of the purpose of the Model Provisions than the remaining subparagraphs of the preamble.

23. As regards the wording in square brackets in subparagraph (a), it was suggested that such wording might not be necessary. However, if the Working Group decided to retain the text in square brackets, reference should be added to the nationality of creditors, so as to make it clear that the draft model legislative provisions were also to apply without discrimination based on the nationality of creditors.

24. Support was expressed for the deletion of the text in square brackets. It was pointed out that, as currently worded, that text might be interpreted as not excluding discrimination based on grounds other than those mentioned therein. The addition of reference to nationality, while providing clarification as to the scope of the provision, would not solve that problem, since it was in practice not possible to provide an exhaustive list of all possible types of discrimination.

25. After having considered a number of proposals for redrafting subparagraph (a), the Working Group agreed to delete the text in square brackets and to add the word “all” before the word “creditors”. The addition of that word was considered to be sufficient for the purpose of clarifying that the model legislative provisions were intended to protect the interests of creditors without any form of discrimination based on nationality, residence, domicile or other factors.

26. As regards subparagraph (b) it was felt that it should highlight the aim of protecting and maximizing the value of the debtor’s assets and that that could best be achieved by deleting the words “for the purposes of administering a cross-border insolvency”.

27. In respect of subparagraph (d), it was considered that the phrase “providing a predictable environment for trade and investment in the enacting State” did not constitute an appropriate statement of the scope of the draft model legislative provisions, which were actually aimed at achieving greater legal certainty in cross-border insolvencies. The Working Group agreed with that consideration and referred subparagraph (d) to the drafting group.

28. It was decided that, throughout the text of the draft Model Provisions, the expression “the enacting State” should be replaced with the words “this State”, which was deemed to be more appropriate for model legislative provisions. The guide to enactment should explain that the national law enacting the Model Provisions might use another expression customarily used to refer to the enacting State.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

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

“[Law] [Section] applies where:

“(a) A foreign proceeding has been commenced and recognition of that proceeding and assistance for the court or a foreign representative in that proceeding is sought in the enacting State; or

“(b) A proceeding is taking place in the enacting State under [insert names of applicable laws of the enacting State relating to insolvency] and assistance with respect to that proceeding is sought from a foreign court;

“(c) A foreign proceeding and a proceeding in the enacting State in respect of the same debtor under [insert names of applicable laws of the enacting State relating to insolvency] are taking place concurrently.”

30. While some hesitation was expressed as to the need for article 1 (on the ground that the article did not provide for anything that was not provided for in the subsequent provisions), the Working Group was of the view that, in order to describe clearly and succinctly the situations covered by the draft Model Provisions, the article was useful.

31. The Working Group noted that an additional situation covered by the draft Model Provisions was one where creditors in a foreign State had an interest in requesting the opening of, or in participating in, an insolvency proceeding in the enacting State. It was decided that a subparagraph should be added to reflect that situation.

32. The article was referred to the drafting group for review and implementation of the Working Group’s decision.

Article 2. Definitions and rules of interpretation

33. The text as considered by the Working Group was as follows:

“For the purposes of this Law:

“(a) ‘Foreign proceeding’ means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in a foreign State in which proceeding the asset and affairs of the debtor are subject to control or supervision by a foreign court or other competent authority, for the purpose of reorganization or liquidation [provided that the debts were not incurred predominantly for household or other personal rather than commercial purposes].
"(b) 'Foreign representative' means a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

"(c) 'Opening of foreign proceedings' is deemed to have taken place when the order opening the proceedings becomes effective, whether or not [final][subject to appeal];

"(d) 'Court' in references to a foreign court is deemed to include a reference to the competent foreign authority other than a court, when such authority is competent to carry out functions referred to in this Law;

"(e) 'Establishment' means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

Subparagraph (a)

34. As regards subparagraph (a), it was suggested that, in view of the distinction established in article 11 between a "foreign main proceeding" and a "foreign non-main proceeding", a corresponding definition of those terms should be contained in subparagraph (a). However, the prevailing view was that subparagraph (a) contained a general definition and that including the proposed details would render the provision excessively complex. It was pointed out that the distinction between a "foreign main proceeding" and a "foreign non-main proceeding" was only relevant within the context of article 11 and that the question of whether it was necessary to include a definition of those proceedings in article 2 should be considered after the Working Group had examined article 11 (see paragraph 147, below).

35. With reference to the words in square brackets in subparagraph (a), it was noted that the Working Group had not yet decided whether consumer insolvencies should be excluded from the Model Provisions. It was also noted that, at its nineteenth session, the Working Group had agreed to delete the definition of "debtor" (A/CN.9/422, para. 45), a provision that might be a suitable place for exclusion of insolvent consumers.

36. As a matter of structure, it was suggested that, if consumer insolvencies were to be excluded, the definition of foreign proceedings was not the appropriate place for such an exclusion. As for the substance of the provision, different views were expressed as to the desirability of excluding consumer insolvencies from the field of application of the Model Provisions. According to one view, they should be excluded since issues of consumer protection might reduce the willingness of States to enact the Model Provisions. Besides, in the absence of an explicit exclusion, the courts of those States that did not provide consumer insolvencies might arise in applying the definition to such situations. In view of the difficulties in formulating a general definition acceptable to different legal systems, it was suggested to delete subparagraph (c) in its entirety. However, it was generally felt that, despite such difficulties, a definition such as the one contained in subparagraph (c) was needed. It was essential for the Model Provisions to clarify from what moment on an insolvency was capable of being recognized abroad and a foreign representative could be admitted to act in foreign jurisdictions. After considering the different views expressed, the Working Group agreed to amend the definition of "foreign proceedings" to include a reference to provisional proceedings, to retain the square brackets around subparagraph (c) and to defer further consideration until the decision on recognition of "foreign proceedings" (articles 7 and 11) (see also paragraphs 55, 64 and 113, below).

Subparagraph (d)

40. As regards the definition of "court" contained in subparagraph (d), it was suggested to delete the words "is deemed to" before the word "include", as those words might inadvertently imply that the Model Provisions established a presumption of law. It was also suggested, for clarity purposes, to include the words "the court" before the words "the competent authority". It was pointed out that insolvency or similar proceedings might fall under the competence of an authority other than a court not only in the foreign jurisdiction, but in the enacting State as well. Since the Model Provisions, on a number of instances, mentioned the courts of the enacting State, it was asked whether article 2 should also include a definition of the courts of the enacting State, in addition to the definition of "foreign court". In reply it was observed that the definition of national courts was essentially a matter for national
legislation and that it should be left for each enacting State to decide for itself how that might be done.

Subparagraph (e)

41. With reference to subparagraph (e), the view was expressed that a definition of "establishment", as contained therein, was not necessary in the Model Provisions, as such an expression was not commonly used in some legal systems, and appeared only once in article 11(1)(b). Also, the phrase "with human means" was felt to be vague and to lend itself to misunderstandings. However, support was expressed for providing a definition of "establishment" in the Model Provisions, as the notion of "establishment" was central for the distinction between main proceedings and non-main proceedings in article 11. After a brief exchange of views on that subject, the Working Group agreed that, while it would be important to provide a definition of "establishment", that question should be considered in the light of the issues raised by article 11.

Article 3. International obligations of the enacting State

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

"To the extent that this Law conflicts with an obligation of the enacting State under or arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail; but in all other respects the provisions of this Law apply".

43. The Working Group decided to delete the phrase "but in all other respects the provisions of this Law apply" as unnecessary.

Article 4. Competent [court] [authority] for recognition of foreign proceedings

44. The draft article as considered by the Working Group was as follows:

"The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by ... [Each State enacting these Model Provisions specifies the court, courts or authority competent to perform the functions in the enacting State]".

45. It was observed that competence for the various judicial functions dealt with in the Model Provisions (providing recognition and interim relief, and cooperation with foreign courts) might lie with different courts in the enacting State. One suggestion was to spell that out in greater detail in article 4. The Working Group, however, was of the view that article 4 should not suggest how the enacting State might describe the allocation of jurisdiction. It was suggested that the guide to enactment was a more appropriate place in which to address detailed aspects of the questions raised by article 4. The drafting group was requested to prepare a draft in line with the view of the Working Group. Since the article might cover competence beyond that for recognition, the Working Group decided to change the title to "Competent [court] [authority]".

Article 5. Authorization to act as a foreign representative

46. The text of the draft article as considered by the Working Group read as follows:

"A [ ... insert title of person or body that may be appointed to administer a liquidation or reorganization under the law of the enacting State] is authorized to seek foreign recognition of the proceeding in which the person or body has been appointed and to exercise such powers as to the foreign assets or affairs of the debtor as the applicable foreign law may permit".

47. It was noted that the authorization embodied in article 5 covered not only an application for recognition but also requests for provisional measures (such as those covered by article 12) and for various forms of cooperation (such as those covered by article 15). While some support was expressed for the view that the current text (in particular the words "exercise such powers . . . as the applicable foreign law may permit") adequately covered those instances, the prevailing view was that the text should express only the principle that the insolvency administrator is authorized to act in a foreign State without enumerating the types of measures or relief the administrator might be seeking.

48. It was observed that the draft Model Provisions themselves might limit the authorization of the person or body covered by article 5; namely, article 16 restricted the powers that might be exercised abroad by a representative of a non-main proceeding. It was suggested that such limits should be reflected in article 5. The Working Group, however, considered that the purpose of article 5 was not to specify the details of the authority of an insolvency administrator but to lay down the principle of the administrator's authority to act abroad.

49. The drafting group was requested to prepare a text reflecting the view of the Working Group.

CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS

Article 6 [12]. Access of foreign representatives to courts

50. The text of draft article 6, as considered by the Working Group, read as follows:

"A foreign representative may

(a) at any time, directly apply for provisional relief in [any appropriate court of the enacting State];

(b) directly apply for recognition of a foreign proceeding, request relief pursuant to article 12, and seek cooperation in accordance with article 15;

(c) [upon recognition,] intervene in collective or any other proceedings in the enacting State affecting the debtor or its assets."

General remarks

51. It was noted that the main purpose of article 6 was to allow direct access by the foreign representative to the
appropriate courts of the enacting State, thus bypassing diplomatic or consular channels that might normally be used for judicial assistance purposes. That faculty was of crucial importance for effective judicial cooperation in cross-border insolvencies. The view was expressed, in that connection, that it would be sufficient for article 6 to reflect that principle generally and that subparagraphs (a), (b) and (c) were not needed in article 6, since those subparagraphs envisaged specific actions dealt with elsewhere in the text. The Working Group considered the proposal useful and requested the drafting group to implement it. Meanwhile, the Working Group proceeded to examine the individual subparagraphs of article 6.

52. It was suggested that, with a view to ensuring adequate cooperation in cases involving main and non-main proceedings, the powers referred to in article 6 should be limited to the representative appointed in the main proceedings. The Working Group decided to revert to that question within the context of article 11 (see paragraphs 104 and 147-155, below).

Subparagraph (a)

53. The view was expressed that, as currently worded, that provision was excessively broad and might give rise to misuse. It was suggested that subparagraph (a) should identify the circumstances that would justify an application by a foreign representative for provisional relief. A question in that regard was whether a request for provisional measures should be linked to an application for recognition, or whether, as subparagraph (a) implied, such a request might be allowed under the Model Provisions even prior to an application for recognition. The widely held view was that it would not be desirable for the Model Provisions to provide for provisional measures to the foreign representative without reference to an application for recognition.

54. At the same time the Working Group affirmed that the Model Provisions should provide the opportunity to request provisional measures once an application for recognition had been filed, though before the granting of recognition. It was suggested that such a link should be required, for example by adding words such as “pending recognition of the foreign insolvency proceedings” or “in view of a future application for recognition”. As provided in the draft Model Provisions, provisional relief was not automatically granted, and the foreign representative was only given the right to apply to the court for provisional relief. It was suggested that existing provisions on proof, such as current article 7, could be expanded to provide that the foreign representative should submit proof of his or her status when applying for provisional relief or other measures. However, it was said that provisional relief under emergency circumstances would be rendered nearly impossible if the Model Provisions were to require prior recognition of the foreign insolvency or submit it to more stringent requirements than already provided in the text (see also paragraphs 110-112, below).

55. The question was asked whether subparagraph (a) was also intended to allow a foreign representative acting under an interim appointment to apply for provisional relief pending a final appointment of a representative in the foreign proceedings. It was explained that a court might appoint an interim representative prior to the final decision that opened the insolvency proceedings. Such a step might be taken in particular because of an urgent need to gather assets, including by way of obtaining provisional measures from foreign courts. It was pointed out that such appointments were under judicial supervision and constituted essential elements of insolvency proceedings in various States. It was also mentioned that, in some jurisdictions, insolvency proceedings might be commenced under statutory authority by non-judicial decisions, such as a corporate act to which the law attached certain consequences. The view was expressed that questions might arise as to whether an interim representative appointed in such non-judicially commenced proceedings might have the right to apply for provisional measures under subparagraph (a). It was observed, however, that although the nature of insolvency proceedings might vary in many jurisdictions, for the purposes of the Model Provisions it was sufficient that the foreign representative had been appointed under “foreign proceedings”, as defined in article 2(a) (see also paragraph 38, above).

Subparagraph (b)

56. After consideration of the views expressed, it was agreed that detailed provisions on provisional relief, including provisional relief sought by interim representatives did not belong in article 6 and should be dealt with in the context of article 12.

Subparagraph (c)

57. As regards subparagraph (b), it was agreed that, if provisions were retained, reference should be made therein to the court referred to in article 4, since that would be the only court competent for the recognition of the foreign proceedings.

58. With regard to the foreign representative’s right to intervene in collective or any other proceedings in the enacting State, it was felt that such a right was closely related to the right of the foreign representative to request the opening of insolvency proceedings in the enacting State and should, therefore, be covered by article 9.

Article 7 [13]. Proof concerning foreign proceeding

59. The text of the article as considered by the Working Group was as follows:

“(1) A petition for recognition of a foreign proceeding [], or a petition for provisional measures [filed prior to an application for recognition.] shall be submitted to the court accompanied by proof of the opening of the proceedings and of the appointment of the foreign representative. Such proof may be in the form of:

(a) a certified copy of the decision or decisions opening the foreign proceeding and appointing the foreign representative;
“(b) a certificate from the foreign court evidencing the opening of the foreign proceeding and appointing the foreign representative; [or (c) in the absence of such form of proof, in any other manner required by the court].

“No legalization of documents referred to in paragraph (1) or other similar formality is required.

“(2) A translation of the documents referred to in paragraph (1) into an official language of the enacting State may be required.”

General remarks

60. It was noted that the proof referred to in article 7 was required for the purposes of the application for recognition or provisional measures under article 12. Therefore, it was suggested that it would be more appropriate to regulate that matter within the context of article 11, which dealt with recognition, rather than as a separate provision. The Working Group requested the drafting group to consider implementing that suggestion. Meanwhile, it proceeded with its review of article 7.

Paragraph (1)

61. With regard to the proof referred to in subparagraphs (a) and (b), the view was expressed that, in emergency situations, an interim or only recently appointed representative might not be in a position to produce the documentation required by article 7. In response, it was pointed out that subparagraph (c) provided the opportunity for the court to request alternative forms of proof in the event that the proof referred to in subparagraphs (a) or (b) was unavailable.

62. The question was raised whether it was reasonable to waive the requirement of legalization of foreign court decisions. In response, it was recalled that the nineteenth session of the Working Group had affirmed that the negotiation of “legalization” requirements was meant to avoid time-consuming notarial or consular procedures ill-suited for dealing with cross-border insolvency cases, because they lacked the required element of speedy treatment of applications by foreign representatives.

63. Furthermore, it was noted that, in practice, courts would require, if necessary, some explanation of the validity and effects of foreign proceedings, particularly from jurisdictions with which they had had no dealings in the past. Article 7 had to be understood in the light of its basic aim, which was to establish a presumptive threshold. The prevailing view in the Working Group was that the amount of information required in article 7 was sufficient for a court to establish whether foreign proceedings within the meaning of article 2 existed and whether a foreign representative had been appointed. The purpose of article 7 would be defeated if that provision would allow a court to establish more stringent requirements than already provided therein.

64. With regard to the requirement for a certified copy of “the decision” opening the foreign proceeding, the concern was expressed that the use of such an expression might exclude those cases in which the foreign representative was appointed, or the proceedings were commenced, without an actual “decision” or “order” of the court (e.g. by right pursuant to statutory authority, such as in a debtor-initiated voluntary proceeding). It was suggested that the Working Group should consider using alternative language or omitting those references altogether. It was also noted that the provision of article 7(1)(b) on the use of a certificate from the foreign court for purposes of proof would be available in the case of such proceedings. It was further suggested that the provision be redrafted so as to cover interim representatives. The Working Group reiterated its view that, in any event, for the purposes of the Model Provisions it was essential that the foreign representative had been appointed under a “foreign proceeding”, as defined in article 2(a) (see also paragraph 38, above).

65. The suggestion was also made that, in order to enable the court in the enacting State before which a petition or petitions for recognition were pending to determine which proceeding was the main proceeding, the foreign representatives should be required to indicate the nature and jurisdictional basis of the foreign proceeding.

Paragraph (2)

66. In respect of the provision in paragraph (2), it was pointed out that in some cases the court might have difficulties in obtaining translation of the documents into an official language of the State and that, under such circumstances, the court might consider it acceptable that the documents be translated into another language understandable to the court. It was also mentioned that, in the case of States with more than one official language, the court might require that all documents be translated into one particular language. One possible way of expressing that, it was said, was to refer to the “official language of the court”.

67. Subject to the views expressed on the provision, the Working Group found the substance of article 7 to be generally acceptable and referred it to the drafting group.

Article 8 [14]. Limited appearance

68. The text as considered by the Working Group was as follows:

“An appearance before a court in the enacting State by a foreign representative in connection with a petition or request pursuant to the provisions of this Law does not subject the foreign representative to the jurisdiction of the courts of the enacting State for any other purpose [related to assets and affairs of the debtor].”

69. The Working Group reiterated the position taken at its previous session that the provision was a useful “safe conduct” rule aimed at ensuring that the court in the enacting State should not assume jurisdiction over the entire debtor’s assets on the sole ground of the foreign representative having made an application for recognition of a foreign
proceeding (A/CN.9/422, para. 161). It was said that assuming jurisdiction where there was no ground for it other than the request for recognition would unduly interfere with the actions of foreign representatives in favour of debtor’s assets and might deter them from taking those actions.

70. The Working Group requested the drafting group to prepare a text that would more clearly reflect its understanding and that would not use the term “appearance”, which was used as a technical term in some jurisdictions.

Article 9 [16]. Commencement of insolvency proceedings by foreign representative

71. The text as considered by the Working Group read as follows:

“A foreign representative is entitled to request the opening of insolvency proceedings in the enacting State if the conditions for opening such a proceeding under the laws of the enacting State are met. Any such request shall be accompanied by the proof of the opening of the foreign proceeding and the appointment of the foreign representative referred to in article 7(1).”

72. The question was asked whether article 9 was needed as a separate provision, since article 6 already provided for the foreign representative’s right of direct access to the courts of the enacting State. In response, it was observed that article 9 contained a substantive rule with a broader scope than the right of direct access under article 6. The purpose of article 9 was to provide the foreign representative with an independent right to request the opening of insolvency proceedings in respect of the debtor, in addition to the creditors’ right to request the opening of such proceedings. The Working Group agreed that a rule such as the one contained in article 9 was needed and that it should be stated in a separate provision.

73. It was asked whether the foreign representative was also empowered to request the opening of insolvency proceedings in respect of subsidiary companies of the debtor in the enacting State. In response it was observed that the foreign representative’s right to request the opening of insolvency proceedings in respect of the debtor did not encompass a right to request the opening of insolvency proceedings in respect of subsidiary companies with a juridical personality of their own, except where such possibility was provided under the laws of the enacting State.

74. Various interventions were made in favour of limiting the right to request the opening of foreign non-main proceedings to the representative in the main proceedings. It was said that the administration of the main proceedings might be jeopardized if representatives in non-main proceedings were empowered to request the opening of other non-main proceedings. Also, such a possibility might adversely affect the coordination of concurrent proceedings and add complexity to the already difficult task of securing control over the debtor’s assets in cross-border insolvencies. However, the Working Group noted that that question was closely linked with the matters dealt with in article 16 and decided to revert to it after consideration of article 16.

75. The Working Group considered that the second sentence of article 9, which dealt with the proof to be submitted by the foreign representative for the purpose of requesting the opening of insolvency proceedings under article 9 was not necessary, since that matter was dealt with in article 7.

Article 10 [17]. Access of foreign creditors to insolvency proceedings in the enacting State

76. The text as considered by the Working Group was as follows:

“(1) Any creditor not resident, domiciled or with a registered office in the enacting State, has the right to commence and file claims in insolvency proceedings in the enacting State, to the same extent and in the same manner as other creditors [of the same priority] who are resident, domiciled or have a registered office in the enacting State, in accordance with the procedural requirements of the enacting State. Claims under public law such as foreign tax and social security claims, if applicable, shall be treated as general (non-priority or non-preference) claims.

“(2) As soon as insolvency proceedings are opened in the enacting State, and to the extent that notification of commencement of insolvency proceedings is required for creditors in the enacting State, the [court][administrator] shall cause notification of the opening of the proceedings to be made also to creditors not resident, domiciled or with a registered office in the enacting State. The notification shall provide [a reasonable minimum time] within which such a creditor can file a claim.

“(3) The contents of the notification shall include:

“(a) an indication of the time limits and the place for filing of claims, and the sanctions that result from failure to comply with those requirements;

“(b) an indication whether secured creditors need to file their secured claims; and

“(c) any other information required to be included in notifications to creditors pursuant to the laws of the enacting State and the orders of the court.”

Paragraph (1)

77. The Working Group recalled the intent of paragraph (1) which was to establish a non-discrimination rule on treatment of foreign creditors in the enacting State. Two main questions in the discussion were whether the rule of non-discrimination required that foreign creditors be admitted in the same or equivalent class of priority as local creditors and whether paragraph (1) should venture into the question of recognition of claims of foreign tax and social security authorities.

78. The question was asked whether the rule of non-discrimination in paragraph (1) concerned only the right to request the opening of the insolvency proceedings or encompassed the treatment to be afforded to foreign creditors as well. In response it was said that the use of the words “to
the same extent and in the same manner" were intended to clarify that paragraph (1) also required equal treatment of foreign creditors in all other respects. However, it was observed that paragraph (1), in its current form, did not give adequate prominence to the principle of non-discrimination, and it was generally felt that it would be desirable to address that principle in a separate paragraph, and to deal separately with the various categories of creditors and claims mentioned therein.

Treatment of foreign creditors

79. With respect to the question of establishing equal treatment between foreign and local creditors "of the same priority", it was noted that definitions and classes of priority of creditors varied greatly from country to country and that it would not be feasible to require that the court of the enacting State should apply to foreign creditors the priority rules of their respective foreign laws. The view was expressed that, since the rule of non-discrimination should be understood as a rule of national treatment, it would be preferable to leave it for the court of the enacting State to determine, on the basis of the national law, what priority, if any, was to be given to foreign creditors.

80. According to another view, it was important to provide a minimum standard for the treatment of foreign claims. It was said that the rule of non-discrimination would be meaningless if, in the absence of such a minimum standard, the court of the enacting State remained free to exclude all foreign claims. It was thus suggested that article 10 should provide that claims of foreign creditors had at least to be treated in the same manner as local non-priority claims.

81. After consideration of the different views expressed, the Working Group agreed that article 10 should provide alternative options to enacting States concerning the treatment of foreign creditors. The drafting group was requested to formulate provisions to that effect.

Foreign tax and social security claims

82. As regards the question of foreign tax and social security claims, it was observed that including reference to those claims might elicit objections to the Model Provisions in those States that traditionally did not accord to foreign tax and other authorities status equal to that accorded to local tax and other fiscal authorities. It was suggested that venturing into that area would diminish acceptability of the Model Provisions and that the last sentence in square brackets should be deleted. However, the view was also expressed that that sentence could be retained to indicate that admitting claims by foreign tax and social security was an option offered to States. The retention of the words in square brackets could serve the purpose of indicating that foreign tax and social security claims were not subsumed in the general reference to "foreign creditors" made earlier in paragraph (1). If the sentence in square brackets were to be deleted, the guide to enactment should clarify that such deletion had not been intended to exclude those claims from the ambit of paragraph (1).

83. In view of the possible different approaches that enacting States might wish to take in respect of foreign tax and social security claims, the Working Group found it preferable to offer options to States reflecting the two positions expressed in the Working Group. That matter, too, was referred to the drafting group.

Other issues raised by paragraph (1)

84. The phrase "to commence [. . .] insolvency proceedings in the enacting State" was found to be inadequate, as in many legal systems the insolvency proceedings were only commenced by judicial decision. It was agreed that paragraph (1), similarly to article 9, should instead refer to the right to "request the opening" of the insolvency proceedings.

85. The question was raised as to whether it would be advisable, in case of non-main proceedings, to limit the right to request the opening of insolvency proceedings to the local creditors, similarly to the provisions contained in article 3(4) of the European Union Convention on Insolvency Proceedings. It was said that such a rule would ensure greater coordination and avoid situations where creditors entirely unrelated to a secondary establishment would request the commencement of non-main proceedings outside the centre of the debtor's main interests. In response it was noted that, under the European Union Convention, the opening of main proceedings had far-reaching consequences. Such a system required a higher degree of coordination between representatives in main proceedings and non-main proceedings and a more restrictive rule than the one contained in paragraph (1) of the draft Model Provisions. Besides, in examining a request for the opening of non-main proceedings, the court of the enacting State retained the prerogative to decline to exercise jurisdiction, if the creditor lacked sufficient connection with the enacting State.

Paragraph (2)

86. It was noted that paragraph (2) imposed on the court or the administrator, as the case might be, an obligation to inform foreign creditors of the existence of insolvency proceedings, so as to give them the opportunity to file their claims or take other measures to protect their rights. As currently worded, paragraph (2) seemed to require such notice in every case or to provide a right to notice exclusively to foreign creditors. However, paragraph (2) had to be read in conjunction with the non-discrimination rule stated in paragraph (1). The underlying idea was that notice to foreign creditors was required when such notice would have to be given to local creditors. The Working Group considered that the purpose of paragraph (2) could be clarified by providing that foreign creditors had to be notified of the commencement of insolvency proceedings in cases in which the law of the enacting State required such notice to be given to local creditors. Since the moment when such notice had to be given varied in different legal systems (e.g. at the outset of the insolvency proceedings or at a later stage), and since at the time of opening of the proceeding the identity of foreign creditors might not yet be known,
the Working Group agreed to delete the words "as soon as" in paragraph (2).

87. It was noted that, at its nineteenth session, the Working Group had based its considerations on the assumption that notification was mandatorily to be given to known creditors only, and it was suggested that appropriate reference to that effect be made in paragraph (2). In that connection, the question was asked how the court of the enacting State would identify all foreign creditors for the purpose of issuing the notification. In reply, it was observed that, for example, the names and addresses of foreign creditors would be obtainable from the debtor’s books and correspondence and that in the case of debtor-initiated insolvencies, national laws often required the debtor to produce a full list of creditors.

88. The Working Group considered at length the question of the form of the notification to be given to foreign creditors. It was noted that national laws provided different procedures for notifying creditors in insolvency proceedings: in some cases all notifications were made by publication in the official gazette or in local papers; in other cases the notification was made individually, by mail or through a court clerk; other procedures included affixing notices within the court premises. Sometimes the law provided for a combination of any such procedures, according to the purpose of the notification.

89. The view was expressed that paragraph (2) should be subject to national law, or that the choice of the form of notification should be left to the discretion of the court of the enacting State. According to that view, providing for a special form of notification for foreign creditors would run counter to the principle of national treatment enshrined in paragraph (1) and would impose excessive burden and costs, which would have to be met by the proceedings. Where the notification requirements were met, for instance by publication, such a method should suffice for notifying foreign creditors.

90. However, it was observed that foreign creditors, by not having direct access to local publications of limited circulation, found themselves in a less advantageous situation than local creditors. In the circumstances, it was reasonable to require special notification for foreign creditors, so as to ensure that all creditors, both local and foreign, had equal opportunity for filing their claims in the insolvency proceedings. It was suggested that the Model Provisions should, as a general rule, require individual notification of foreign creditors. In the event, however, that such notification would entail excessive costs for the proceedings, or would not seem feasible under the circumstances, the court of the enacting State could, as an exception, be given the discretion to choose another appropriate form of notification, or to dispense with such notification.

91. Several interventions were made in favour of the latter proposition, which was considered to be an equitable solution for providing an effective method of notification for foreign creditors, while giving the court of the enacting State sufficient latitude for adopting other methods of notification, when the circumstances of a given case did not warrant individual notification. The Working Group considered that, for purposes of clarity, a provision to that effect should be included, perhaps in a separate article, and referred the matter to the drafting group.

92. The Working Group also considered various suggestions regarding the language in which such notification was to be issued. Those suggestions included the following: that the notification be issued in more than one language, including one or more of the official languages of the United Nations; that the notification contain a statement of its purposes in all official languages of the United Nations (e.g.: "Notification of insolvency proceedings—File your claim within ___ days."); or that the notification be issued in a standard form to be annexed to the Model Provisions. While agreeing in principle on the desirability that foreign creditors be notified in a language accessible to them, the Working Group felt that not all enacting States might be in a position to introduce such a requirement. It was noted, in that connection, that it would be in the foreign creditor’s own interest to obtain a translation of the notification and that in most cases a diligent creditor would do so. It was suggested that a model form or forms of such notifications should be included in the guide to enactment.

93. As to the question of the time-limit within which foreign creditors could file a claim, the Working Group, while considering that such time-limit had to be reasonable, agreed that such question should be dealt with within the context of paragraph (3). It was thus agreed that the last sentence of paragraph (2) should be deleted (see paragraph 96, below).

Paragraph (3)

94. As a general remark, it was pointed out that certain States had undertaken specific obligations, under regional agreements on judicial cooperation, to effect notifications in a special manner. The view was expressed that those States might have difficulties in implementing paragraph (3) in any manner not consistent with their existing requirements. The Working Group took note of those remarks.

95. The view was expressed that subparagraphs (a) and (b) were not necessary, since most jurisdictions would normally require that the information referred to therein be provided to creditors. However, the prevailing view was that subparagraphs (a) and (b) contained minimum requirements and that, for the purpose of ensuring uniformity in the application of the Model Provisions, it was useful to retain those two subparagraphs.

96. The Working Group discussed the question of the time-limit within which foreign creditors could file their claims. It was felt that it would be equitable to afford foreign creditors an extended time-limit to file their claims, as it was the case in a number of jurisdictions. However, as it would not be realistic to provide a single time-limit for all jurisdictions, it was agreed to require that foreign creditors be given a reasonable time-limit.

97. With regard to subparagraph (a), the Working Group decided to delete the reference to the sanctions that might result from the failure by the foreign creditor to observe the
CHAPTER III. RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS

Article 11[6]. Recognition of foreign insolvency proceedings

99. The draft article as considered by the Working Group was as follows:

"(1) For the purposes of this Law, a foreign proceeding shall be recognized:

"(a) as a foreign main proceeding if the court of the foreign proceeding has jurisdiction based on the centre of the debtor's main interests;

"or

"(b) as a foreign non-main proceeding if the debtor has an establishment [within the meaning of article 2(e)] in the foreign jurisdiction.

"(2) The court shall grant or refuse an application for recognition of a foreign main proceeding within ____ days after the application has been filed with the court.

"(3) Absent proof to the contrary, the registered seat of the debtor is deemed to be the centre of its main interests."

100. A view was expressed that it was unnecessary to introduce in the Model Provisions the notion of "recognition" of foreign insolvency proceedings; it was said that according to the draft Model Provisions the purpose of having a foreign proceeding recognized was to obtain relief as dealt with in article 12 and that it would be possible to make granting such relief subject to the same safeguards as they currently appeared in article 11 without a special procedure for "recognition". The Working Group, however, was of the view that recognition was a useful concept since it clarified the nature of the decision-making process leading to relief as dealt with in article 12 and since recognition would have other consequences foreseen in the draft Model Provisions (in particular in the context of concurrent proceedings under article 16).

101. The Working Group agreed that the article should more clearly express that recognition was not automatic, that it was given upon request of the foreign representative, and that recognition could only be granted if proof specified in article 7 had been presented. There was general agreement that, in expressing those elements, it was necessary to make it clear that the court seized with a request for recognition of a foreign proceeding should not reconsider the grounds on which the foreign court decided to open that foreign proceeding.

102. It was observed that the term "recognition" was a technical term used for giving effect to foreign judicial decisions, that under the draft Model Provisions "recognition" meant only recognition of foreign proceedings, and that in the European Union Convention on Insolvency Proceedings the effects of recognition of foreign proceedings were much broader than in the draft Model Provisions. In order to avoid possible confusion about the effects of recognition under the draft Model Provisions and in order to show more clearly that those effects under the draft Model Provisions differed from the effects of recognition under the European Union Convention, it was suggested to replace the word "recognition" by another expression. The drafting group was requested to consider that matter.

103. It was recalled that the Working Group had discussed how the Model Provisions should deal with insolvencies involving specially regulated financial services institutions such as banks, insurance companies, and collective investment entities. It was said that States might wish to take into account special circumstances possibly raised when the foreign debtor was such an institution. It was suggested that article 11 might be an appropriate place to reflect such special considerations by including among the grounds for refusal of recognition of a foreign proceeding the fact that the foreign debtor was a financial institution regulated under the law of the enacting State.

104. It was suggested that recognition should be restricted to foreign main proceedings and that the effects of foreign non-main proceedings should be restricted to providing a more limited relief and to providing assistance and cooperation as dealt with in article 15. The Working Group, recalling its considerations of the issue at its previous session (A/CN.9/422, paras. 82-83, 101 and 103), decided to revert to the issue in the context of article 12 (see paragraphs 147-155, below).

Article 12 [7]. Relief available to foreign representatives

105. The text of draft article 12, as considered by the Working Group, read as follows:

"(1) (a) From the time of the filing of an application for recognition until recognition has been granted or refused, and where necessary to protect the assets of the debtor or the interests of creditors, the court may, upon the request of the foreign representative, grant any of the [types of] relief permitted under paragraph (2); [such relief shall be available upon application in the case of a foreign main proceeding in one of the States listed in Annex X];

"(b) The court shall order the foreign representative to give such notice as would be required for requests for provisional relief in the enacting State;

"(c) Such relief may not extend beyond the date that recognition is granted or denied, unless extended under paragraph (2)(b)(ii).

"(2) (a) Upon recognition of a foreign main proceedings, or upon application for recognition in regard to proceedings taking place in one of the States listed in Annex X, the commencement or continuation of individual actions by creditors against [the debtor or] [the
debtor's assets) and the transfer of any assets of the
debtor are stayed. The stay is subject to any exceptions
or limitations which would apply under

“Option I: any law of the enacting State which
would apply to proceedings determined by the court to
be comparable to the foreign main proceeding;

“Option II: the law of the foreign main proceeding
(if the foreign main proceeding is taking place in one of
the States listed in Annex X);

“(b) Upon recognition of any foreign proceeding,
the court may, upon the request of the foreign repre­
sentative, grant any appropriate relief including:

“(i) staying actions that are not stayed or ex­
tending the stay of action under paragraph
(2)(a);

“(ii) extending relief granted under paragraph
(1) to protect the assets of the debtor or
interests of creditors;

“(iii) compelling testimony or the delivery of in­
formation concerning the assets and liabilities
of the debtor;

“(iv) permitting the foreign representative to
preserve and manage the assets of the
debtor;

“(v) granting other relief which may be avail­
able under the laws of the State of the for­
eign proceeding or under the laws of the
enacting State, including actions to reverse
or render unenforceable legal acts detri­
mental to all creditors;

“(c) The foreign representative shall give notice of
recognition, of the stay under paragraph (2)(a), and of
any relief granted under paragraph (2)(b), within ___
days to all known creditors that have an address in the
enacting State;

“(d) Any relief under this paragraph shall terminate,
“(i) unless extended prior to such termination,
within ___ days after recognition; or

“(ii) if insolvency proceedings under the law of
the enacting State have been commenced
and to the extent that the court in such
proceedings orders the termination of such
relief.

“(3) Upon request of the foreign representative in a
foreign main proceeding, the court may, no earlier than
___ days after recognition, grant turnover of assets to
the foreign representative for administration, realization
or distribution in the foreign proceeding.

“(4) In granting or denying relief under this article, the
court must be satisfied that creditors collectively are
protected against prejudice and will be given a fair op­
opportunity to assert their claims against the debtor.

“(5) The court may at any time, upon request of a
person or entity affected by relief granted or requested
under this article, deny, modify or terminate such relief.

“(6) A court granting relief to the foreign representa­
tive may condition such relief on compliance by the
foreign representative with the orders of the court.”

General remarks

106. It was noted that, under the approach developed at
the previous session, certain “minimum” effects would re­
sult more or less automatically from recognition. Those
included in particular: a stay of individual creditor actions
and of transfers by the debtor of interests in assets, and
the possibility for the foreign representative to seek from
the court additional relief appropriate in the circumstances.

107. The view was expressed that article 12 was exces­
sively long and that the Working Group should attempt to
ref ormulate it more concisely. Furthermore, article 12 dealt
with a number of topics which, while interrelated, did not
necessarily have to be all addressed in the same article. The
understanding of article 12 might be improved if it were
divided into an appropriate number of separate articles.

108. Questions were raised as to whether the relief pro­
vided in article 12 was of a permanent or a temporary
nature. In reply it was observed that the different forms of
relief provided in article 12 constituted essentially tempo­
rary measures and that the court of the enacting State had
the authority to determine their duration in each case, as
appropriate in the circumstances.

109. It was pointed out that article 12 did not establish
any time-limit for the court of the enacting State to act
upon the application for recognition following a decision
granting provisional relief. It was suggested that a time­
limit might be useful with a view to avoiding or mitigating
the potential damage to creditors or other interested parties
that might result from relief measures that extended over an
unreasonably long period due to delay by the court in act­
ing upon the application for recognition. In response it was
observed that, while the spirit of article 12 required expedi­
tious consideration by the court of the enacting State of
the application for recognition of the foreign proceedings,
the question raised was not suitable for being addressed
within the limited scope of the Model Provisions and
should be left for the laws of the enacting State.

Paragraph (1)

110. The Working Group considered the question
whether the foreign representative’s right to apply for pro­
visional relief had necessarily to be linked to an application
for the recognition of the foreign proceedings. According
to one view, the purpose of giving the foreign representa­
tive the right to apply for provisional relief was to empower
the foreign representative to take measures urgently needed
for the protection of the assets of the debtor. In some cases
those measures might be needed even prior to the filing of
an application for recognition. The Model Provisions could
require that the application be filed within a specified time­
limit from the date of request for provisional relief.

111. According to another view, the requirement of an
application for recognition could not be dispensed with,
since it was only the recognition that established definitely
the status of the foreign representative in the enacting State.
Paragraph (1) had already taken into account the possibility
of an urgent need for provisional relief by authorizing the
granting of provisional relief prior to final recognition. Besides, authorizing provisional relief prior to, or in anticipation of, an application for recognition, would render article 12 overly complex, as it would require that the Model Provisions specify the circumstances and conditions (such as a security deposit by the foreign representative or other conditions currently provided in some national laws) under which such relief might be granted.

112. After discussing the various views expressed, the Working Group agreed to retain the link between provisional relief and the application for recognition of the foreign proceedings, as reflected in paragraph (1). It was felt that the relative likelihood that a foreign representative might not be able to apply for recognition simultaneously with a request for provisional relief did not warrant venturing into that question, which should be left for the laws of the enacting State.

113. Various interventions were made concerning the possibility of an interim representative applying for provisional relief. The Working Group noted that the question of interim representatives had already been raised in connection with a number of other provisions and that the drafting group had been requested to draft a separate set of provisions dealing with the status of interim representatives for later consideration by the Working Group. Once the Working Group had agreed on those provisions, an interim representative meeting the requirements might be regarded as a duly appointed foreign representative for all purposes of the Model Provisions, including article 12. Subsequently, the Working Group considered a draft provision dealing with interim representatives and decided that, with appropriate safeguards concerning a duty by the interim representative to notify the court of the conditions of his or her appointment and with a modification of the definitions in article 2 to include reference to interim representatives and to proceedings commenced on an interim basis, no separate provision was necessary. (See also paragraph 38, above).

114. The question was asked whether the rights given to the foreign representative under paragraph (1) also extended to local or foreign creditors. In response it was observed that foreign creditors were given the right to initiate insolvency proceedings under article 10, and that local creditors might have other rights under local law, which was consistent with the draft Model Provisions. The purpose of article 12 was to give certain powers to the foreign representative as the representative of the creditors and did not deal with the rights of creditors to obtain provisional relief.

**Paragraph 2(a)**

115. In the previous sessions of the Working Group there had been agreement on the importance of the provisions contained in paragraph (2)(a), without which the preservation of the assets of the debtor could not be assured. However, the definition of the scope of the stay and possible exceptions or limitations remained to be considered.

116. It was noted that the main purpose of the stay of individual actions was to prevent the debtor's assets from being dispersed through enforcement measures ordered in individual actions. While there was general support for the need to stay all individual actions that could lead to such a situation, different views were expressed as to how the scope of the stay in paragraph (2)(a) should be defined.

117. Reservations were expressed against the use of the words "actions against the debtor's assets", which in some legal systems would not be technically acceptable, as a judicial action had to be brought against a person. Instead, it was suggested to use the expression "actions concerning the debtor's assets" or other similar expressions.

118. Also, questions were asked about the meaning of the words "actions against the debtor". Since the Working Group had agreed that the draft Model Provisions should also cover insolvencies of individuals, the concern was expressed that, without qualification, the words "actions against the debtor" might include types of actions that some legal systems excluded from the stay of actions in insolvency proceedings, such as actions concerning civil status, alimony, and various administrative and criminal procedures. In response it was noted that questions of exceptions and limitations were left to be decided under the laws of the enacting State, or the laws of the foreign main proceedings, as currently provided in the two options in paragraph (2)(a).

119. It was suggested that paragraph (2)(a) should not be limited to judicial measures, as seemed to be implied by the use of the word "actions", and that it was important to encompass also non-judicial enforcement measures by secured creditors, which were authorized in some jurisdictions. The words "or proceedings" should thus be added after the word "actions", and appropriate explanation should be given in the guide to enactment that those proceedings might also include non-judicial measures.

120. Reservations were voiced concerning the use of the words "by creditors" in paragraph (2)(a). It was noted that the stay was meant to cover all actions capable of affecting the assets of the debtor or increasing the debtor's liabilities. However, in some actions the status of creditors might be in dispute or might only be established by final judgement. Also, it might be important to stay actions brought by interested parties who might not be technically regarded as "creditors" at the time of the stay.

121. After considering various proposals for clarifying the purpose of paragraph (2)(a), the Working Group agreed in principle to use the phrase "actions or proceedings concerning the debtor's assets, rights, obligations or liabilities".

122. The view was expressed that a general stay of actions against the debtor was not ordinarily provided in some jurisdictions, and could only be granted under special conditions established by the competent court. In those jurisdictions, the courts might require proof by the foreign representative of an imminent danger to the assets of the debtor that would result from the continuation of individual actions. The view was also expressed that in some other jurisdictions where a stay was available but the requirements under local law were very high, such requirements would need to be observed, so as to avoid double standards for local and foreign representatives in the enacting State.
Thus, it was suggested to add the word “requirements” before the word “exceptions” in the second sentence of paragraph (2)(a).

123. In response it was noted that paragraph (2)(a) dealt with automatic effects of the recognition of the foreign insolvency proceedings. Such effects should not be subject to requirements that imposed difficult evidentiary burdens on the foreign representative. Besides, sufficient safeguards had been incorporated into paragraphs (4), (5) and (6) to protect the interests of creditors and other interested parties. Thus, the Working Group felt that the word “requirements” should not be added to the second sentence of paragraph (2)(a).

124. With regard to the stay of the transfer of any assets of the debtor, the Working Group recalled its previous discussions on that issue (A/CN.9/422, paras. 108 and 109). During those discussions, suggestions had been made that the mention in paragraph (2)(a) of the stay on transfer of the debtor’s assets needed to be made subject to transfers that might be necessitated by the ordinary course of business, such as the payment of salaries to employees. It was suggested that the stay provided in paragraph (2)(a) should not extend to transfers made in the course of ordinary business and should essentially concern acts of an “irregular” nature.

125. It was generally felt, however, that the introduction of the notion of “irregularity” in paragraph (2)(a) might create uncertainty as to the scope of the stay. Also, an attempt to define “regular” transfers (i.e. those made in the course of ordinary business) which would not be affected by the stay might render paragraph (2)(a) excessively complex. A more pragmatic approach would be to leave that matter to be treated as an exception or limitation that might be made to paragraph (2)(a) under the laws of the enacting State or of the State of the foreign main proceedings under the two options provided in paragraph (2)(a), and clarify that the scope of the stay provided therein would be subject to those exceptions and limitations.

126. It was noted that the purpose of the stay of transfer of assets was to preserve the integrity and value of the debtor’s assets, and that, therefore, paragraph (2)(a) should cover not only the transfer of title to assets or turnover of assets, as the current text implied, but should also encompass acts of disposition such as the pledge or encumbrance of assets.

**Paragraph 2(b)**

127. As a general remark, it was stated that the measures contemplated in paragraph (2)(b) might concern the rights of parties other than the foreign representative and that, therefore, those measures should not be made subject to an application by the foreign representative. It might be useful to provide that the court could order any of those measures also without such an application. In response it was observed that the draft Model Provisions were concerned with judicial cooperation in cross-border insolvencies and that the purpose of paragraph 2(b) was to empower the foreign representative to request measures that might be required in the enacting State in the interest of the foreign proceedings. Accordingly, paragraph 2(b) did not affect remedies available to other interested persons under local law.

128. Having found the substance of subparagraphs (b)(i), (b)(ii) and (b)(iii) to be acceptable, the Working Group focused its discussions on subparagraphs (b)(iv) and (b)(v).

129. It was noted that some jurisdictions might require special qualification or licensing for the administrators of assets of an insolvent debtor, or might reserve those functions to an official receiver or another official appointed by the court. Courts in those jurisdictions might not be in a position to permit a foreign representative to manage the assets of the debtor. It was agreed that subparagraph (b)(iv) should be worded in a manner that afforded the court the necessary flexibility in appointing a person to preserve, administer and manage the assets of the debtor, including, but not limited to, the foreign representative.

130. It was suggested that the foreign representative’s right to intervene in collective or any other proceedings in the enacting State affecting the debtor or its assets, currently contained in article 6(c) should be included among the relief contemplated in paragraph (2)(b). However, it was observed that the foreign representative’s right under article 6(c) was a right automatically flowing from the recognition of the foreign proceedings, for which no application to the court was required. Therefore, it would not be appropriate to include the substance of article 6(c) in paragraph (2)(b).

131. It was pointed out that the authority given to the foreign representative under subparagraph (2)(b)(iv) would include all acts which a person appointed by the court to preserve and manage the assets of an insolvent debtor was authorized to perform under the laws of the enacting State affecting the debtor or its assets, currently contained in article 6(c) should be included among the relief contemplated in paragraph (2)(b). The Working Group, however, considered that the general reference in subparagraph (b)(iv) was useful since it emphasized the non-exhaustive nature of the list.

132. Various interventions were made with respect to subparagraph (2)(b)(v). One was to delete it since the chapeau of paragraph (2)(b) made it clear that the court of the enacting State retained the authority to grant other relief not specifically listed in paragraph (2)(b). The Working Group, however, considered that the general reference in subparagraph (v) was useful since it emphasized the non-exhaustive nature of the list.

133. As to the possibility mentioned in subparagraph (b)(v) that the court might issue measures pursuant to a foreign law, i.e. the law of the foreign proceeding, it was widely thought that such a possibility was unrealistic and that, therefore, the reference to foreign law should be deleted. Nevertheless, the Working Group considered that it would be useful for the draft Model Provisions to retain that possibility in the form of an option for the enacting State presented outside the text of the provision itself. The Secretariat was requested to prepare a draft for such an optional provision.

134. While agreeing with the principle that a foreign representative should be given the right to commence actions to reverse or render unenforceable legal acts detrimental to creditors (sometimes referred to as “Paulian ac-
tions”), the Working Group considered that it would be preferable to delete the reference to them in subparagraph (b)(v). The numerous issues raised by such actions did not lend themselves to simple and harmonized solutions within the limited scope of article 12. The Working Group decided to remove the reference to those actions from (b)(v). However, the Working Group decided to consider, at a later stage, the question whether certain limited aspects concerning those actions could be dealt with in a separate article in the Model Provisions. It was stated that such actions might present the only possible way for a foreign representative to recover assets. It was stated that, in any event, the standing of the foreign representative to commence such actions should be tied to recognition.

Subparagraph (c)

135. The suggestion was made to subject the notice requirements referred to in subparagraph (c) to the discretion of the court; if that was adopted, the duty to give notice could be incorporated into paragraph (6). The Working Group, however, decided that the substance of the provision should be retained, that the duty to give notice should expressly be linked to the law of the enacting State, and that giving such notice would not delay the effectiveness of the relief.

Subparagraph (d)

136. As to subparagraph (i), it was said that some measures under paragraph (2) might, at the time of their issuance, be meant to be in force for a period beyond the moment when recognition was granted (such measures might be, for example, a stay of actions or suspension of transfers of assets); on the other hand, the court could also issue measures designed to terminate at a point of time that had no connection with the time of issuance of the decision granting recognition. Therefore, it was considered that the moment of recognition was not a suitable reference for terminating relief. Proposals were made for the deletion of the provision, with which the Working Group agreed.

137. As to subparagraph (ii), it was suggested that the opening of insolvency proceedings in the enacting State should automatically terminate relief granted to the foreign representative, without subjecting the termination to the order of the court. The opposing view was that a provision on the automatic termination of relief would enable debtors to free themselves from restraints such as those mentioned in paragraph (2) by requesting the opening of local insolvency proceedings. It was therefore useful to leave to the court a degree of control over the termination of relief. The Working Group, however, thought that the Model Provisions should not deal with the issue and decided to delete the subparagraph. It was observed that, as a consequence of the deletion, the question of termination of relief upon the opening of local proceedings was left to the law outside the Model Provisions. In that connection it was observed that, if relief had been granted by a court different from the court that opened the local insolvency proceedings, the decisions of the two courts might interfere between themselves. A suggestion was made that a provision resolving such potential interference was desirable, with which, however, the Working Group did not agree.

Paragraph (3)

138. It was observed that the debtor’s assets were often not physically turned over to the foreign representative; instead, the debtor was divested of its assets, and it was the administration of the assets that was entrusted to the foreign representative. It was therefore suggested that a term other than “turnover” should be used.

139. Several suggestions were made to the effect that the discretion to permit the foreign representative to administer, realize or distribute debtor’s assets should be restricted. In particular, it was necessary to make sure that any local insolvency proceedings were concluded and that, if local proceedings had not been initiated, the interests of local creditors were not prejudiced. The Working Group agreed and requested that the Secretariat prepare a draft to be considered at the next session.

Paragraph (4)

140. Suggestions were made to include the protection of debtor’s interests among the conditions for granting or denying relief to the foreign representative. Some proponents of that view stated that it would be desirable to create a presumption that the debtor was not treated unfairly or that the foreign representative should not be required to prove that the debtor was treated fairly.

141. The Working Group decided to consider at its next session a draft provision along the following lines: “In granting or denying relief under this article, the court must be satisfied that creditors collectively and the debtor are protected against undue prejudice and will be given a fair opportunity to assert their claims and defences.”

Paragraph (5)

142. There was broad agreement that the possibility to deny, modify or terminate relief provided in paragraph (5) also applied to “automatic” relief, i.e. stay of actions and stay of transfers of assets as provided by paragraph (2)(a). The question was raised whether such understanding of the provision did not take away much of the meaning of the automatic relief. However, it was stated in reply that one could not exclude the possibility of improper orders for recognition of a foreign main proceeding and that it was therefore useful to have the possibility to vacate under paragraph (5) such an improper order. The possibility to vacate improper orders was important in particular because such orders might be issued in ex parte proceedings.

143. The question was raised whether the words “relief granted or requested” meant that paragraph (5) offered an avenue for preventing the entry into effect of automatic relief under paragraph (2)(a). It was suggested in reply that it was not inconsistent with the automatic nature of relief under paragraph (2)(a) that the court had the power to deny the stay of actions or stay of transfers of assets as envisaged...
144. It was suggested that the criteria under which relief might be denied, modified or terminated were to be found in paragraph (4) of article 12.

145. The Working Group agreed to consider at its next session an alternative wording to paragraph (5) along the following lines: "Nothing in foregoing provisions shall be construed as barring or restricting the power of the court to deny, modify or terminate any relief under this article". Another possible wording suggested was: "Upon request of a person or entity affected by relief, the court may deny, modify or terminate such relief".

Paragraph (6)

146. One view was that the paragraph stated the obvious and could be deleted. The prevailing view, however, was that the provision was useful in that it might stimulate the court to tailor relief to the particular circumstances of the case by attaching to the relief conditions or orders. The following possible redraft of the provision was offered for consideration at the next session of the Working Group: "A court granting relief to the foreign representative may subject such relief to any conditions it considers appropriate".

Recognition of foreign "main" and "non-main" proceedings

147. Having concluded the consideration of article 12, the Working Group considered the questions of recognition of a "main" proceeding (as referred to in article 11(1)(a)), recognition of a "non-main" proceeding (as referred to in article 11(1)(b)), and the consequences of recognition of a non-main proceeding. The Working Group decided that article 2 (Definitions) should contain definitions of main and non-main proceedings.

148. Views were expressed in favour of retaining the current approach, which linked automatic relief to recognition of a main proceeding and left relief in favour of both main and non-main proceedings to the discretion of the court. However, according to other opinions that approach should be modified.

149. One opinion was that only main proceedings should be recognized. That solution was defended on the ground that admitting recognition of non-main proceedings would make it difficult to coordinate among several insolvency proceedings. That view, however, received little support since it neglected the desirability for providing efficient relief in non-main proceedings.

150. Another opinion, which eventually received the endorsement of the Working Group, was that solutions should be sought on the basis of the following principles: recognition of both main and non-main proceedings; availability of appropriate relief in both types of proceedings; primacy of the main proceeding over non-main proceedings; limits as to the consequences of non-main proceedings; and coordination between main and non-main proceedings. In support of that opinion it was stated that the limits were necessary to diminish the possibility of several representatives in non-main proceedings competing for relief in one or more States. Regarding the way the limits of court discretion should be expressed, various proposals were made. The view was expressed, however, that the need for complicated provisions concerning non-main proceedings might excessively complicate the Model Provisions.

151. One proposal was to require the foreign representative to state to the court the objectives of the foreign proceeding; such a statement would assist the court in determining whether and what kind of relief should be granted.

152. Another proposal was to distinguish the effects of the main proceeding from the effects of non-main proceedings. It was said that the scope of the discretion in the case of non-main proceedings should be narrower than in the case of main proceedings, and that guidelines or criteria along the lines of which discretion was restricted should be expressed in the Model Provisions. It was considered important to establish a hierarchy among concurrent proceedings and to accord relief in accordance with that hierarchy.

153. Yet another proposal was to limit the discretion of the court with reference to the list of types of measures in article 12(2)(b). It was said that measures referred to in subparagraphs (i) and (ii) should be reserved for main proceedings, whereas measures under subparagraphs (iii), (iv) and (v) could also be provided to non-main proceedings.

154. A further proposal was to provide in the Model Provisions that relief granted to non-main proceedings must be such that it does not interfere with the orderly carrying out of the main proceeding.

155. By way of a general observation, it was said that there were in particular two situations where it was not possible to adjust measures in non-main proceedings to the measures in the main proceeding: where it was not clear in which State was the centre of the debtor's main interests; and where it was not possible (e.g. for political reasons) to open the proceedings in the State where the debtor had the centre of its main interests, or where a main proceeding could not be opened sufficiently quickly in that State.

Article 13 (7 bis). Public policy exceptions

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

"Notwithstanding article 11, a court shall refuse to recognize a foreign proceeding or to grant relief under this Law where the effects of such recognition or relief would be manifestly contrary to public policy."

157. The Working Group was informed that in certain jurisdictions the Model Provisions could only be enacted in such a way that they would not conflict with certain fundamental rules and principles that formed the basis of their legal tradition. The Working Group took note of those remarks.
158. In response to a question as to the scope of application of article 13, which in its current wording was linked to the provision on recognition of foreign proceedings, the Working Group considered that the public policy exception should apply to the entirety of the Model Provisions. The Secretariat was requested to prepare a revised draft reflecting that consideration.

159. The Working Group noted that different legal systems used different formulations for expressing a public policy exception, and decided that, pending further discussions, the words "shall" and "may", to the extent they would be needed in the new draft, should appear in square brackets.

160. Suggestions were made concerning the word "manifestly", used as the qualifier of "public policy": the word should be deleted since it was not clear what it meant; if the word were to be kept, the Model Provisions should provide an explanation; in the context of international insolvency it was inappropriate to restrict the operation of public policy only to cases where the violation of it was manifest. According to another view, the qualifier should be kept in order to facilitate international cooperation and to avoid a situation where cooperation under the Model Provisions would be frustrated because the particular step or measure was seen to be contrary to a mere technicality of a mandatory nature. Furthermore, it was observed that the word was used in many international legal texts and that its objective and meaning were well understood: its purpose was to emphasize that public policy exceptions should be interpreted restrictively and that article 13 was only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State. Pending further discussion, it was decided to keep the word in square brackets.

ARTICLE 14 [10]. DISCHARGE OF OBLIGATIONS TO DEBTOR

161. The text of the draft article read as follows:

"(1) Where an obligation has been honoured in the enacting State for the benefit of a debtor who is subject to foreign proceedings recognized in accordance with article 11, when it should have been honoured for the benefit of the foreign representative pursuant to relief provided to the foreign representative upon recognition, the person honouring the obligation shall be deemed to have discharged the obligation if the person was unaware of the foreign proceeding.

"(2) Where an obligation referred to in paragraph (1) is honoured before notification in accordance with article 12(1)(b) and (2)(c) is made, the person honouring the obligation is presumed, in the absence of proof to the contrary, to have been unaware of the foreign proceeding; where the obligation is honoured after such notification, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the foreign proceeding."

162. The Working Group noted that article 14 restated rules on presumptions that existed in many jurisdictions. It was suggested that, by establishing harmonized rules on those presumptions, the Model Provisions would, on the one hand, foster legal certainty and, on the other hand, help recover assets that were transferred by the debtor in bad faith.

163. However, it was pointed out that the scope of the draft Model Provisions was limited to matters of judicial relief and cooperation and that the issues to which article 14 pertained could not be adequately dealt with in the Model Provisions, without addressing a number of other substantive issues which were not covered in the current text (such as set-offs and actions to reverse or render unenforceable legal acts detrimental to all creditors, see paragraph 134, above). After considering the different views expressed, the Working Group felt that, notwithstanding the importance of those rules in insolvency proceedings, it would be preferable for the Working Group not to attempt to provide a harmonized solution for that matter. It was therefore decided that article 14 should be deleted.

CHAPTER IV. COOPERATION WITH FOREIGN JURISDICTIONS


164. The text of the draft article before the Working Group was as follows:

"(1) The courts of the enacting State, and administrators appointed in the enacting State, shall cooperate to the maximum extent possible with foreign courts or competent authorities and with foreign representatives.

"(2) The courts of the enacting State may request information or assistance directly from foreign courts or competent authorities in any matter relating to insolvency proceedings in the enacting State.

"(3) (a) Cooperation may be implemented by any appropriate means, including:

"(i) appointment of a person to act at the direction of the court;

"(ii) communication, by any means deemed appropriate by the court, of information, and coordination of the administration and supervision of the debtor's assets and affairs;

"(iii) approval or implementation by courts of arrangements concerning the coordination of proceedings;

"(iv) [...] the enacting State may wish to list additional forms or examples of cooperation].

"(b) Cooperation with foreign courts or competent authorities and foreign representatives shall in all cases be subject to the procedural requirements of the court."

Paragraph (1)

165. The Working Group recalled and reaffirmed its views about the provision at its last session (A/CN.9/422, paras 130-134).
166. The Working Group expressed the understanding that the duty to cooperate as expressed in article 15 had a broad scope of application and covered contacts between courts, between insolvency administrators, between the court in the enacting State and a foreign representative, and between an administrator in the enacting State and a foreign court. However, it was recognized that the nature of those contacts differed and that those differences should be more clearly expressed in the provision. In particular, it was noted that cooperation between administrators was subject to court supervision; however, it was also noted that while the degree of control of courts over administrators varied, administrators were often expected to have a broad latitude in taking decisions. Furthermore, it was stated that it was particularly important to provide a clear statutory authority for courts to cooperate, which authority was in many legal systems lacking or was insufficient. In light of those considerations, it was decided to deal with cooperation involving administrators in a provision separate from the one on cooperation between courts.

167. It was decided not to use in the article the word “administrator” since many enacting States would use another term for the person or body appointed to administer debtors’ assets.

168. It was suggested to use, in reference to the courts of the enacting State in paragraphs (1) and (2), such language that would express more clearly the fact that, typically, it would be only one or a limited number of courts in that State that would wish to cooperate with, or seek information from, foreign courts in respect of a given insolvency proceeding.

Paragraph (2)

169. It was decided that reference to “insolvency proceedings in the enacting State” in paragraph (2) (as well as in other places in the Model Provisions) should be aligned to the style used in article 1(b) and (c).

Subparagraph (3)(a)

170. A proposal was made to limit cooperation to measures available under local law. However, the prevailing view was that the substance of the subparagraph was acceptable. It was decided to split subparagraph (a)(ii) into two subparagraphs.

Subparagraph (3)(b)

171. The concern was expressed that subparagraph (b), as drafted, might, by subjecting cooperation to “the procedural requirements of the court”, be interpreted as requiring the court to use procedures (e.g. communications via higher courts, letters rogatory or other special formalities to be used in written communications) that were meant to be relaxed or eliminated by article 15. It was noted in that regard that some procedural requirements might be regarded as a matter of public policy.

172. The Secretariat was requested to prepare a revised draft to meet that concern. One idea mentioned in that context was to suggest to enacting States (in the provision itself or in the guide to enactment) to specify the procedural requirements that did not apply to cooperation with foreign courts.

CHAPTER V. CONCURRENT PROCEEDINGS

Article 16 [18]. Concurrent proceedings

173. The text of the draft article before the Working Group was as follows:

“(1) Where an insolvency proceeding has been opened in a foreign jurisdiction in which the debtor has the centre of its main interests, the courts of the enacting State shall have jurisdiction to open insolvency proceedings against the debtor only if the debtor has an establishment or assets in the enacting State, and the effects of those proceedings shall be restricted to the establishment or [assets] of the debtor situated in the territory of the enacting State.

“(2) Recognition of a foreign insolvency proceeding is, for the purposes of initiating proceedings in the enacting State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent.”

Paragraph (1)

174. It was suggested and the Working Group agreed that it should be made clear that article 15 (on cooperation) applied in the case of concurrent proceedings covered by article 16.

175. The view was expressed that, while paragraph (1) was useful in fostering coordination among, and reduction of, multiple proceedings, the Model Provisions should go further and contain also a general rule on international jurisdiction for the opening of insolvency proceedings along the lines of article 3 of the European Union Convention on Insolvency Proceedings. In response it was stated that a rule on international jurisdiction went beyond the ambit of the project, gave rise to complex issues and might reduce the acceptability of the Model Provisions. It was thus sufficient for the text to establish limits on the jurisdiction of the enacting State when that State recognized a foreign main insolvency proceeding. It was agreed that for the effects of paragraph (1) to be triggered, article 16(1) should make it clear that recognition of the foreign main proceeding was required.

176. Differing views were expressed as to whether, after recognition of a foreign main proceeding, the opening of a local proceeding should only be possible if the debtor had an establishment in the enacting State, or whether local proceedings were allowed to be opened with respect to assets that did not fall within the meaning of “establishment”. The prevailing view was that it would be preferable to restrict the commencement of insolvency proceedings in the enacting State to those cases in which the debtor had an establishment in the enacting State. It was felt that such an approach represented a meaningful and not overly
ambitious step towards reducing multiple insolvency proceedings, and that such a solution was susceptible to acceptance by States. However, considerable support was also expressed for retaining reference to the presence of assets in the enacting State, since in some legal systems the courts had jurisdiction to open insolvency proceedings on the sole basis that the debtor had assets in the country. It was also stated that, as a compromise situation, one could consider allowing the opening of a non-main proceeding where assets, but not an “establishment”, were present if certain conditions were fulfilled. It was felt the matter required further discussion and the Working Group decided to retain both options in square brackets in paragraph (1).

177. With a view to ensuring greater coordination, various interventions favoured the limitation of the effects of local proceedings to the establishment or assets of the debtor situated in the territory of the enacting State, as was provided in the European Union Convention on Insolvency Proceedings. The countervailing view, however, was that, while the recognition of the foreign main proceedings had far-reaching consequences under the European Union Convention, the draft Model Provisions provided limited effects to the recognition of the foreign proceedings (i.e. stay of actions and of transfer of assets and other relief that might be provided under article 12). Therefore, it would not be advisable to retain such a limitation in article 16. Having noted the differing views expressed, the Working Group felt that the matter required further consideration at the next session.

178. A suggestion was made that an option be provided whereby the enacting States could limit the application of paragraph (1) to recognition of foreign main proceedings emanating from countries listed in an annex to the Model Provisions. It was said that the reason for that suggestion was the fact that paragraph (1) dealt with court jurisdiction, a matter that went beyond the original scope of the draft Model Provisions, which was access of foreign representatives to local courts and recognition of foreign insolvency proceedings.

179. It was suggested that article 16 could provide for the possibility of authorizing the court to terminate or suspend a local proceeding upon recognition of a foreign main proceeding. It was also suggested that article 16 should provide, in a separate paragraph, a rule whereby the recognition of a foreign main proceeding would preclude the opening of a local main proceeding in respect of the same debtor. It was further suggested that the existence of local proceedings should constitute grounds for barring the recognition of a foreign proceeding. The Working Group felt that those suggestions required further consideration and agreed to revert to them at its next session.

Paragraph (2)

180. It was noted that different legal systems provided different criteria for proving that the debtor was insolvent; the question was raised as to what was the effect of paragraph (2) on those criteria. While it was stated in reply that it was the purpose of paragraph (2) to facilitate such proof when a foreign insolvency proceeding was recognized, it was suggested that clarification of the interplay between those local criteria and the presumption would be desirable.

181. It was suggested that paragraph (2) should refer only to foreign main proceedings and that consideration should be given to moving the paragraph to article 9.

Article 17 [19]. Rate of payment of creditors

182. The text of the draft article, as considered by the Working Group, was as follows:

“Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding opened in another State may not receive a payment for the same claim in an insolvency proceeding opened with regard to the same debtor in the enacting State, so long as the payment to the other creditors of the same class for their claims in the proceeding opened in the enacting State is proportionately less than the payment the creditor has already received.”

183. The Working Group generally agreed that article 17 was useful. However, it was noted that the current text raised some difficulties, such as the different meanings that might be attributed to the expression “same class” in different legal systems. It was agreed that the expressions “secured claims” and “rights in rem” should be kept in square brackets as options to be chosen by the enacting State. The Working Group decided to continue its consideration of the article at its next session.

C. Other matters

Official administrators

184. It was stated that, in the context of article 15, as well as in the broader context of the Model Provisions, it would be useful to make express reference to the fact that in some States a number of important obligations and rights regarding insolvency proceedings were by law conferred upon State-appointed officials (the titles of those officials differed and included expressions such as official receiver or insolvency regulator). Those officials might act on the basis of the statutory authority or might be regularly called upon by courts to intervene in insolvency proceedings. In some States the scope of the functions of such officials was quite broad while in others it was limited. The Working Group agreed to discuss at its next session what would be the best way to refer to those officials in the Model Provisions, with a view to making it clear that nothing in the Model Provisions displaced any of the provisions in force in the enacting State concerning the duties and obligations of those officials. The Secretariat was requested to prepare a draft for consideration at the following session.

Revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency

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INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continues its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995) on the development of a legal instrument relating to cross-border insolvency. This is the third session that the Working Group is devoting to the preparation of that instrument, tentatively entitled the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency.2

2. The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions


2The reports of the previous two sessions of the Working Group devoted to preparation of the draft provisions are found in documents A/ CB.9/419 (Vienna, 30 October-10 November 1995) and A/CN.9/422 (New York, 1-12 April 1996).
made to it by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century", held in New York in conjunction with the twenty-fifth session of the Commission, from 18 to 22 May 1992. The Commission decided at its twenty-sixth session to pursue those suggestions further. Subsequently, in order to assess the desirability and feasibility of work in this area, and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders. 3

3. The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the Commission should, at least at the current stage, have the limited but useful goal of facilitating judicial cooperation, and court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as "judicial cooperation" and "access and recognition"). Subsequently, an international meeting of judges was held specifically to elicit their views as to how the Commission in this area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, Toronto, 22-23 March 1995). The view of the participating judges and government officials concerned with insolvency was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, and access and recognition.

5. The deliberations of the Working Group have focused on provisions, tentatively in the form of model provisions, addressing issues including: definitions of certain terms; rules on recognition of foreign proceedings; relief afforded upon recognition; modalities of court access for foreign insolvency representatives; and judicial cooperation and coordination in the context of concurrent proceedings. This note sets forth draft provisions on various aspects of those issues, reflecting the deliberations that have taken place thus far, including those of the informal, open drafting group established by the Working Group to revise draft provisions during the course of the deliberations.

DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY

Preamble

WHEREAS the [Government] [Parliament] of the enacting State considers it desirable to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) Fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested parties [whether or not resident, domiciled or with a registered office in the enacting State];

(b) Facilitating the gathering of information about the debtor's assets and affairs, and protecting and maximizing the value of the debtor's assets for the purposes of administering a cross-border insolvency;

(c) Facilitating the rescue of financially troubled though viable businesses, thereby protecting investment and preserving employment;

(d) Encouraging and providing a predictable environment for trade and investment in the enacting State; and

(e) Furthering cooperation between the courts and other competent authorities of States affected by cases of cross-border insolvency.

Be it therefore enacted as follows.

Chapter I. General provisions

Article 1. Scope of application

This [Law] [Section] applies where:

(a) A foreign proceeding has been commenced and recognition of that proceeding and assistance for the court or a foreign representative in that proceeding is sought in the enacting State; or

(b) A proceeding is taking place in the enacting State under [insert names of applicable laws of the enacting State relating to insolvency] and assistance with respect to that proceeding is sought from a foreign court; or

(c) A foreign proceeding and a proceeding in the enacting State in respect of the same debtor under [insert names of applicable laws of the enacting State relating to insolvency] are taking place concurrently."

Notes

The text in square brackets in subparagraph (a) may be considered as a formulation affirming non-discriminatory treatment of creditors and interested parties.

For the purposes of this Law:
(a) "Foreign proceeding" means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in a foreign State in which proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign court or other competent authority, for the purpose of reorganization or liquidation (provided that the debts were not incurred predominantly for household or other personal rather than commercial purposes).

(b) "Foreign representative" means a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

(c) "Opening of foreign proceedings" is deemed to have taken place when the order opening the proceedings becomes effective, whether or not [final [subject to appeal]]

(d) "Court" in references to a foreign court is deemed to include a reference to the competent foreign authority other than a court, when such authority is competent to carry out functions referred to in this Law;

(e) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Notes

1. An issue to be considered further is the applicability of the model provisions in the context of consumer insolvencies, or other contexts in which consumer protection issues might be raised. It was suggested at an earlier stage that a definition in article 2 of “debtor” be included, which could set forth an exclusion of “consumer” debtors (A/CN.9/419, para. 33; A/CN.9/ WO.V/WP.44, note 2 under article 2(h); A/CN.9/422, paras. 40-45). However, that approach to articulating a consumer exclusion is unavailable in light of the deletion of the definition of “debtor” (A/CN.9/442, para. 45). The present text includes reference in the definition of “foreign proceeding” to an exclusion of proceedings involving predominantly debts of a private or consumer nature, rather than those incurred in the course of commercial activity.

2. Another approach might be to leave exclusions of consumer cases to be resolved under public policy exceptions to recognition. However, the Working Group may wish to explore other avenues further, in view of the caution needed to avoid suggesting wider use of public policy exemptions.

3. The Working Group has not agreed on the final disposition of the provision on the point of “opening” of foreign insolvency proceedings. Meanwhile, the provision here has been recast somewhat. It attempts to strike a balance between, on the one hand, the perhaps excessive openness of giving effect to any foreign proceedings that has been commenced (thus potentially encompassing proceedings that have not yet been given judicial or other official sanction), and, on the other hand, the excessive stringency of limiting recognition to proceedings at an advanced stage of finality.

4. In the deliberations to date the question has arisen as to how the model provisions might respond to cases involving specially regulated financial services institutions such as banks and insurance companies. As had been noted in previous discussions of the point, such institutions may be subject to special regulatory regimes including for liquidation or reorganization purposes, and therefore not subject to ordinary insolvency statutes. For similar reasons States might wish to take into account in their provisions on cross-border insolvency special circumstances possibly raised when the foreign debtor is such an institution. A blanket approach of excluding from the ambit of the model provisions foreign proceedings that involve as debtors such institutions may be unnecessarily broad and inflexible. Thus, the reinstatement of a definition of the term "debtor", excluding foreign, specially regulated financial institutions would not seem to be generally acceptable or necessarily desirable. An alternative approach may be to include in chapter III (rules of recognition) a possibility for the decision on recognition, or on specific relief, to take into account the character of a debtor as a financial services institution. This might take the form of a provision in article 11 along the following lines: “The court shall refuse an application for recognition of a foreign proceeding if the debtor is a financial institution regulated under the law of the enacting State.”

5. Mention was made in earlier deliberations of the possibility that a State might distinguish treatment of foreign insolvency proceedings involving financial services institutions according to whether branches of the debtor in the State were subject to special regulatory regimes in the State (A/CN.9/419, paras. 34 and 35).

6. Subparagraph (d) has been added in response to the suggestion at the previous session to make it clear that references in the model provisions to foreign “courts” encompassed foreign competent authorities carrying out functions referred to in the text (A/CN.9/422, para. 49).

7. Subparagraph (e) sets forth a definition of “establishment” reflecting the formulation found in article 2(h) of the Convention on Insolvency Proceedings of the European Union.

Article 3. International obligations of the enacting State

To the extent that this Law conflicts with an obligation of the enacting State under or arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail, but in all other respects the provisions of this Law apply.

Article 4. Competent [court] [authority] for recognition of foreign proceedings

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by . . . [Each State enacting these Model Provisions specifies the court, courts or authority competent to perform the functions in the enacting State].

Notes

In the guide to enactment, or perhaps even in the text itself, it could be pointed out that two basic possibilities exist; a specific court, or the courts where the assets of the debtor happen to be located, pursuant to the local rules on jurisdiction.

Article 5. Authorization to act as a foreign representative

A . . . [insert title of person or body that may be appointed to administer a liquidation or reorganization under the law of the enacting State] is authorized to seek foreign recognition of the proceeding in which the person or body has been appointed and to exercise such powers as to the foreign assets or affairs of the debtor as the applicable foreign law may permit.
Chapter II. Access of foreign representatives and creditors to courts

Notes

At the preceding session, it was suggested that the order of the model provisions should reflect the order in which events would take place in cases of foreign representatives seeking recognition and assistance. Thus, the provisions on access of foreign representatives and creditors to the courts would, if a chronological order were followed, appear earlier in the text. Such a relocation of the provisions on access is presented for the consideration of the Working Group. The relocation is reflected in the new title of chapter II, and in the renumbering of former articles 12-17 as 6-10. The former article numbers appear in square brackets in this chapter and through the consequentially renumbered remainder of the text.

Article 6 [12]. Access of foreign representatives to courts

"A foreign representative may

(a) at any time, directly apply for provisional relief in [any appropriate court of the enacting State];

(b) directly apply for recognition of a foreign proceeding, request relief pursuant to article 12, and seek cooperation in accordance with article 15;

(c) [upon recognition,] intervene in collective or any other proceedings in the enacting State affecting the debtor or its assets.

Notes

The above text was arrived at by the drafting group taking into account the deliberations of the Working Group (A/CN.9/422, paras. 70-74).

Article 7 [13]. Proof concerning foreign proceeding

(1) A petition for recognition of a foreign proceeding [or a petition for provisional measures [filed prior to an application for recognition,] shall be submitted to the court accompanied by proof of the opening of the proceedings and of the appointment of the foreign representative. Such proof may be in the form of:

(a) a certified copy of the decision or decisions opening the foreign proceeding and appointing the foreign representative;

(b) a certificate from the foreign court evidencing the opening of the foreign proceeding and appointing the foreign representative; [or

(c) in the absence of such form of proof, in any other manner required by the court].

Notes

No legalization or other similar formality is required. (2) A translation of the documents referred to in paragraph (1) into an official language of the enacting State may be required.

Article 8 [14]. Limited appearance

An appearance before a court in the enacting State by a foreign representative in connection with a petition or request pursuant to the provisions of this Law does not subject the foreign representative to the jurisdiction of the courts of the enacting State for any other purpose [related to assets and affairs of the debtor].

Notes

1. The words "related to assets and affairs of the debtor" have been added to make it clear that article 8, while providing a "limited appearance", does not attempt to preclude the courts in the enacting State from asserting jurisdiction on grounds other than those related to application for recognition (i.e. on grounds other than those related to the insolvency), a result that might conflict with national procedural laws (A/CN.9/422, para. 162).

2. The reference to relief being conditioned by the court on compliance by the foreign representative with court imposed conditions has been transferred to article 12(6), in line with a suggestion at the previous session (A/CN.9/422, para. 165).

Article 9 [16]. Commencement of insolvency proceedings by foreign representative

A foreign representative is entitled to request the opening of insolvency proceedings in the enacting State if the conditions for opening such a proceeding under the laws of the enacting State are met. Any such request shall be accompanied by the proof of the [opening of] the foreign proceeding and the appointment of the foreign representative referred to in article 7(1).
Chapter III. Recognition of foreign insolvency proceedings

Article 11 [6]. Recognition of foreign insolvency proceedings

(1) For the purposes of this Law, a foreign proceeding shall be recognized:

(a) as a foreign main proceeding if the court of the foreign proceeding has jurisdiction based on the centre of the debtor’s main interests;

or

(b) as a foreign non-main proceeding if the debtor has an establishment [within the meaning of article 2(e)] in the foreign jurisdiction.

(2) The court shall grant or refuse an application for recognition of a foreign main proceeding within ___ days after the application has been filed with the court.

(3) Absent proof to the contrary, the registered seat of the debtor is deemed to be the centre of its main interests.

Notes

1. The above text of article 11 (formerly article 6) reflects the deliberations of the Working Group at the previous session (A/CN.9/422, paras. 76-93). Those deliberations have resulted in particular in a distinction between foreign "main" and foreign "non-main" proceedings.

2. Paragraph (2), which has not as such yet been discussed in the Working Group, is offered by the drafting group as an outgrowth of the discussion thus far. The question may be raised what would be the result if the decision on recognition was not issued within the specified period.

3. Paragraph (3) has been added to increase the specificity and predictability of the rule based on the "centre of the debtor’s main interests" (A/CN.9/422, para. 91).

Article 12 [7]. Relief available to foreign representative

(1) (a) From the time of the filing of an application for recognition until recognition has been granted or refused, and where necessary to protect the assets of the debtor or the interests of creditors, the court may, upon the request of the foreign representative, grant any of the [types of] relief permitted under paragraph (2); [such relief shall be available upon application in the case of a foreign main proceeding in one of the States listed in Annex X];

(b) The court shall order the foreign representative to give such notice as would be required for requests for provisional relief in the enacting State;

(c) Such relief may not extend beyond the date that recognition is granted or denied, unless extended under paragraph (2)(b)(ii).

(2) (a) Upon recognition of a foreign main proceeding [or upon application for recognition in regard to proceedings taking place in one of the States listed in Annex X], the commencement or continuation of individual actions by creditors against [the debtor or] [the debtor’s assets] and
the transfer of any assets of the debtor are stayed. The stay is subject to any exceptions or limitations which would apply under Option I:

any law of the enacting State which would apply to proceedings determined by the court to be comparable to the foreign main proceeding;

Option II:

the law of the foreign main proceeding [if the foreign main proceeding is taking place in one of the States listed in Annex X];

(b) Upon recognition of any foreign proceeding, the court may, upon the request of the foreign representative, grant any appropriate relief including:

(i) staying actions that are not stayed or extending the stay of action under paragraph 2(a);

(ii) extending relief granted under paragraph (1) to protect the assets of the debtor or interests of creditors;

(iii) compelling testimony or the delivery of information concerning the assets and liabilities of the debtor;

(iv) permitting the foreign representative to preserve and manage the assets of the debtor;

(v) granting other relief which may be available under the laws of the State of the foreign proceeding or under the laws of the enacting State, including actions to reverse or render unenforceable legal acts detrimental to all creditors;

(c) The foreign representative shall give notice of recognition, of the stay under paragraph (2)(a), and of any relief granted under paragraph (2)(b), within ___ days to all known creditors that have an address in the enacting State;

(d) Any relief under this paragraph shall terminate,

(i) unless extended prior to such termination, within ___ days after recognition;

or

(ii) if insolvency proceedings under the law of the enacting State have been commenced and to the extent that the court in such proceedings orders the termination of such relief.

(3) Upon request of the foreign representative in a foreign main proceeding, the court may, no earlier than ___ days after recognition, grant turnover of assets to the foreign representative for administration, realization or distribution in the foreign proceeding.

(4) In granting or denying relief under this article, the court must be satisfied that creditors collectively are protected against prejudice and will be given a fair opportunity to assert their claims against the debtor.

(5) The court may at any time, upon request of a person or entity affected by relief granted or requested under this article, deny, modify or terminate such relief.

(6) A court granting relief to the foreign representative may condition such relief on compliance by the foreign representative with the orders of the court.

Notes

1. The Working Group has before it the revised version of article 12 (formerly article 7) prepared by the drafting group at the previous session, reflecting the deliberations at that stage (A/CN.9/422, paras. 108). To it has been added in paragraph (1) an option for enacting States that would wish to accord relief upon application for recognition, rather than waiting for the later stage of actual recognition, for proceedings emanating from States on a list of designated countries. A companion option is set forth in Option II in paragraph (2)(a), for those States that would wish to accord States on the list application of their law to determine exceptions and limitations to the stay. Also a new arrival here is the provision (paragraph (6), formerly in article 8 [14]) linking relief for the foreign representative to compliance with any conditions that might be attached to that relief by the court (see note 2 under article 8).

2. It may be pointed out in the guide to enactment that an enacting State might adopt a combination of Options I and II, if the State were to retain the bracketed text in Option II.

3. In view of the content of article 12, former articles 8 (modification and termination of relief) and 9 (notification of creditors) have been rendered superfluous and no longer appear.

4. Paragraph (1) suggests that application for recognition is a prerequisite for the granting of provisional measures to the foreign representative. As discussed in note 1 under article 7(1), the Working Group may wish to consider whether a more flexible approach might be warranted, which would allow courts to take account of cases in which urgent circumstances might justify the granting of provisional measures prior to the actual filing by the foreign representative of the application for recognition. It is conceivable that, in order to protect assets urgently from sequestration or dissipation, a court other than the court competent to hear a petition for recognition would be requested to issue provisional measures, prior to the filing of the application for recognition with the competent court.

5. The words "the debtor's assets" in paragraph (2)(a) reflect the suggestion at the previous session that the stay of individual creditor action should be limited in scope so as not to prevent creditors from proving claims against the debtor (A/CN.9/422, para. 97). Such an approach would be intended to leave in place a stay of individual creditor execution against assets.

6. Paragraph (2)(a) sets forth two options for enacting States as regards the law to be applied to determine the exceptions or limitations applicable to the stay upon recognition. Option II contains in turn an option for States that would wish to accord application of the foreign law on the basis whether or not the foreign proceeding emanates from a State on a prescribed list.

7. The same type of observation made in the note 2 under article 11(2) may be made with respect to paragraph (2)(c).

8. Paragraph (2)(c) has been reformulated so as to provide more specific notice.

9. Paragraph (2)(d)(i) has been modified to avoid retroactive reinstatement issues that could arise under the formulation in the version in A/CN.9/422.

10. Paragraph (3) has been reformulated to reflect that the point of time at which application for relief is made is generally not as critical a factor as when the relief is granted or becomes effective.
Article 13 (7 bis). Public policy exceptions

Notwithstanding article 11, a court shall refuse to recognize a foreign proceeding or to grant relief under this Law where the effects of such recognition or relief would be manifestly contrary to public policy.

Article 14 [10]. Discharge of obligations to debtor

(1) Where an obligation has been honoured in the enacting State for the benefit of a debtor who is subject to foreign proceedings recognized in accordance with article 11, when it should have been honoured for the benefit of the foreign representative pursuant to relief provided to the foreign representative upon recognition, the person honouring the obligation shall be deemed to have discharged the obligation if the person was unaware of the foreign proceeding.

(2) Where an obligation referred to in paragraph (1) is honoured before notification in accordance with article 12(1)(b) and (2)(c) is made, the person honouring the obligation is presumed, in the absence of proof to the contrary, to have been unaware of the foreign proceeding; where the obligation is honoured after such notification, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the foreign proceeding.

Notes

At the previous session, the Working Group exchanged views on the present article deferring a final decision as to its disposition until other parts of the text had been examined further (A/CN.9/422, paras. 124-128).

Chapter IV. Cooperation with foreign jurisdictions

Article 15 [11]. Authorization of cooperation

(1) The courts of the enacting State, and administrators appointed in the enacting State, shall cooperate to the maximum extent possible with foreign courts or competent authorities and with foreign representatives.

(2) The courts of the enacting State may request information or assistance directly from foreign courts or competent authorities in any matter relating to insolvency proceedings in the enacting State.

(3) (a) Cooperation may be implemented by any appropriate means, including:

(i) appointment of a person to act at the direction of the court;

(ii) communication, by any means deemed appropriate by the court, of information, and coordination of the administration and supervision of the debtor's assets and affairs;

(iii) approval or implementation by courts of arrangements concerning the coordination of proceedings;

(iv) [...] the enacting State may wish to list additional forms or examples of cooperation.

(b) Cooperation with foreign courts or competent authorities and foreign representatives shall in all cases be subject to the procedural requirements of the court.

Notes

The Working Group has before it the revised version of article 15 (formerly article 11), which emerged at the stage of the deliberations achieved at the previous session. (A/CN.9/422, para 143). The text presented to the Working Group by the drafting group, but not considered in full by the Working Group at that session, is reproduced here for further consideration.

Chapter V. Concurrent proceedings

Article 16 [18]. Concurrent proceedings

(1) Where an insolvency proceeding has been opened in a foreign jurisdiction in which the debtor has the centre of its main interests, the courts of the enacting State shall have jurisdiction to open insolvency proceedings against the debtor only if the debtor has [an establishment] [or assets] in the enacting State, and the effects of those proceedings shall be restricted to the [establishment] [or] [assets] of the debtor situated in the territory of the enacting State.

(2) Recognition of a foreign insolvency proceeding is, for the purposes of initiating proceedings in the enacting State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent.

Notes

Former paragraph (3) (on cooperation between locally appointed administrators in the enacting State and foreign representatives) is now incorporated in article 15 (A/CN.9/422, para. 197).

Article 17 [19]. Rate of payment of creditors

Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding opened in another State may not receive a payment for the same claim in an insolvency proceeding opened with regard to the same debtor in the enacting State, so long as the payment to the other creditors of the same class for their claims in the proceeding opened in the enacting State is proportionately less than the payment the creditor has already received.

Notes

The provision has been slightly reformulated to make its intent clearer, namely, to avoid the situation in which creditors would be paid twice or out of proportion to the rate of payment given to other creditors of the same class.

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INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continued its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995) on the development of a legal instrument relating to cross-border insolvency.\(^1\)

2. Prior to the decision to undertake work on cross-border insolvency, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders (A/CN.9/398). Its purpose was to assess the desirability and feasibility of work in that area, and to define appropriately the scope of the work. The suggestion arising from the Colloquium was that work by the Commission should, at least at the initial stage, have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

3. Subsequently, an international meeting of judges was held specifically to elicit their views as to work by the Commission in that area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, Toronto, 22-23 March 1995) (A/CN.9/413). The view of the participating judges and government officials was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

4. The Working Group commenced its work on the project at its eighteenth session by discussing possible issues to be covered in a legal instrument dealing with judicial cooperation and access and recognition in cross-border insolvency (A/CN.9/419).

5. At its nineteenth session, the Working Group considered a set of draft legislative provisions on judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (A/CN.9/422).

6. At its twentieth session, the Working Group focused on revised articles of the text, entitled the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency. At that session the Working Group also considered the question of the form of the instrument being prepared. A number of views and arguments were considered in favour of preparing model provisions for national legislation, model provisions for an international treaty and an international treaty. After considering the various views, the Working Group decided to continue and complete its work on the draft Model Legislative Provisions. That would not exclude the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency, if the Commission at a later stage so decided (A/CN.9/433, paras. 16-20).

7. The Working Group held the present session in New York from 20 to 31 January 1997. The Working Group was composed of all States members of the Commission. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia,
Austria, Bulgaria, China, Egypt, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Poland, Russian Federation, Saudi Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and United States of America.

8. The session was attended by observers from the following States: Angola, Bangladesh, Burkina Faso, Canada, Côte d'Ivoire, Croatia, Czech Republic, Ireland, Kuwait, Lesotho, Netherlands, Pakistan, Republic of Korea, South Africa, Sweden, Switzerland, Syrian Arab Republic, Turkmenistan and Uzbekistan.

9. The session was also attended by observers from the following international organizations: European Insolvency Practitioners Association (EIPA), Hague Conference on Private International Law, Instituto Iberoamericano de Derecho Internacional Económico, International Association of Insolvency Practitioners (INSOL), International Bar Association (IBA), International Bar Foundation, International Chamber of Commerce (ICC), International Women's Insolvency and Restructuring Confederation (IWiRC) and International Association of Lawyers.

10. The Working Group elected the following officers:

Chairman: Ms. Kathryn Sabo (Canada)

Rapporteur: Mr. Joseph F. Bossa (Uganda)

11. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.V/WP.47) and a note by the Secretariat containing newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency (A/CN.9/WG.V/WP.48), which was used as a basis for the Working Group's deliberations.

12. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Consideration of newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

13. The Working Group considered the newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency presented in the note by the Secretariat (A/CN.9/WG.V/WP.48). It first considered draft articles 15-22 and thereafter draft articles 1-14. For lack of time, the Working Group did not consider draft article 23. At the end, the Working Group considered principles relating to possible new provisions on concurrent proceedings.

14. As the Working Group progressed with its consideration of document A/CN.9/WG.V/WP.48, it established an informal drafting group to revise the draft Model Legislative Provisions, reflecting the deliberations and decisions that had taken place. The informal drafting group prepared revised provisions, except for articles 12, 13, 14 and 22. The deliberations and conclusions of the Working Group are set forth below in chapter II. The annex to the present report reproduces the draft articles proposed by the informal drafting group and articles 12, 13, 14 and 22 as revised by the Secretariat pursuant to the considerations of the Working Group. The Working Group did not have time to review the draft articles that had been prepared pursuant to its consideration.

15. The Working Group took note of a number of improvements suggested to the various language versions of the draft Model Legislative Provisions and requested the Secretariat to review the various language versions, taking into consideration the suggestions made during the session of the Working Group.

16. The Working Group noted that it would have wished to have some more time available for completing its review of the draft. Yet it decided, in line with the hope expressed by the Commission at its twenty-ninth session, to submit the draft Model Legislative Provisions to the Commission for consideration and completion at its thirtieth session. It was suggested that the Commission begin its considerations with article 14 and the following articles of the draft Model Legislative Provisions.

II. DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY

A. Consideration of draft provisions

Article 15. Relief upon application for recognition of a foreign proceeding

17. The text of the article, as considered by the Working Group, read as follows:

"(1) From the time of filing an application for recognition until the application is decided upon, the court may, under the conditions in article 17, grant any relief permitted under that article.

"(2) The court shall order the foreign representative to give such notice as would be required for requests for provisional relief in this State.

"(3) Such relief may not extend beyond the date that the application for recognition is decided upon, unless it is extended under article 17(1)(c)."

Paragraphs (1) and (2)

18. The view was expressed that article 15 should not refer to article 17 since a representative of a foreign non-main proceeding should not have access to all types of relief available under article 17 (see paragraphs 50-53, Official Records of the General Assembly, Fifty-first session, Supplement No. 17 (A/5117), para. 237.)
below). It was, however, considered that at the time of application for recognition it might not be clear whether the foreign proceeding was a main or a non-main proceeding and that, in any case, the court granting pre-recognition relief should be able to tailor the relief to the needs of the foreign representative. In addition, it was considered desirable for the Model Provisions to specify a minimum list of discretionary remedies that would be available in each State enacting the Model Provisions as not all States currently provided all kinds of relief provided in article 17. It was therefore thought necessary to keep the list of relief as broad as and flexible as possible, and the Working Group decided that the parallelism between the list of relief under articles 15 and 17 should be maintained. It was also decided that, instead of merely referring to the conditions in article 17, those conditions should be spelled out in article 15. It was suggested that a representative of a foreign non-main proceeding should be able to obtain relief only after as it pertained to the assets covered by that proceeding, a suggestion that also applied to article 17 (see paragraph 53, below). A view was expressed that relief under article 15 should be limited to relief currently available under the law of the enacting State.

19. It was noted that the court in paragraphs (1) and (2) might be any court in the enacting State competent to issue provisional measures and not necessarily the court that, according to article 4, had jurisdiction relating to recognition of foreign proceedings and cooperation with foreign courts.

20. A suggestion was made to subject the issuance of relief under article 15 to any exceptions or limitations applicable under the law of the enacting State, in the same way as was provided in article 16(2) for relief granted under that article. However, the Working Group considered that relief under article 15 (as well as article 17) was discretionary and that there was, therefore, no need to make the issuance of the discretionary relief subject to exceptions and limitations contained in the law of the enacting State.

21. In that context, it was stated that the laws of some States did not permit in situations envisaged in article 15, the issuance of all measures mentioned in article 17(1) (e.g., staying the commencement or continuation of individual actions, as provided in subparagraph (a)) and that for that reason article 15 might pose a difficulty for those States.

22. It was suggested that the measure granted under subparagraph (a) should be restricted to staying the execution of a court decision, but that a creditor should not be prevented from initiating or continuing an action to preserve a right. According to that view, a stay under the subparagraph might be in conflict with fundamental rights of each person to seek in courts the protection of its rights (see paragraph 54, below).

Paragraph (3)

23. According to one view, it should be provided that measures issued under article 15 were to terminate when the application for recognition was decided upon and that any measure which needed to be issued thereafter was a new measure. According to another view, which the Working Group adopted, it was useful to leave to the court a possibility to extend the relief granted upon application for recognition, so as to ensure that there was no hiatus between the provisional measure and the measure issued after recognition.

Article 16. Relief upon recognition of a foreign main proceeding

24. The text of the article, as considered by the Working Group, read as follows:

"(1) Upon recognition of a foreign main proceeding, the court may permit the foreign representative to administer, realize and distribute assets of the debtor in the foreign proceeding. If a proceeding concerning the debtor under [insert names of laws of the enacting State relating to insolvency] has been opened, such permission may only be given after the completion of that proceeding."

"The enacting State may wish to consider the following alternative wording to replace the chapeau of article 16(1):

"(1) Upon recognition of a foreign main proceeding, or upon application for recognition of a foreign main proceeding taking place in one of the States listed in annex X, ...

"The enacting State may wish to consider the following two alternatives with respect to paragraph (2):

Alternative I (addition to paragraph (2)): If the foreign main proceeding is taking place in one of the States listed in annex X, the scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under the law of the foreign main proceeding.

Alternative II (replacement of paragraph (2)): The scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under the law of the foreign main proceeding."
foreign main proceedings and foreign non-main proceedings. Article 16 was intended to provide certain mandatory effects only to a foreign main proceeding, upon recognition in the enacting State. Having noted the particular nature of the provisions contained in article 16, as distinct from those provided in articles 15 and 17, the Working Group agreed that the title of article 16 should be amended and referred the matter to the drafting group.

26. It was suggested that article 16 should contain a provision that limited the mandatory effects of a foreign main proceeding so as not to go beyond the effects that such proceedings had in the originating State. The countervailing view, however, was that under such a rule it would not be possible for the court of the enacting State to determine which effects were to be given to a foreign proceeding in the enacting State without engaging in a possibly complex analysis of foreign law. It was also stated that the enacting State would be concerned primarily with the effects given to a foreign proceeding in its own territory, rather than with the effects of that proceeding in the foreign jurisdiction where the proceeding originated.

27. It was noted that the provisions of article 16 had been based on the assumption that no local insolvency proceedings existed at the time the recognition of the foreign proceeding was sought. Concerns were voiced that article 16 did not adequately deal with situations where concurrent proceedings in respect of the same debtor existed in the enacting State and in the foreign jurisdiction. It was suggested that article 14 should include the existence of local proceedings among the grounds justifying the refusal of recognition to a foreign proceeding. Alternatively, article 16 should limit the effects of recognition to giving the foreign representative access to the local proceedings. Another view was that those concerns raised a question of coordination between local and foreign proceedings, and that the appropriate place for addressing them was in chapter V of the draft Model Provisions. (For a further discussion of concurrent proceedings, see paragraphs 185-200, below.)

28. The view was expressed that article 16 should aim at the protection of all creditors, foreign and local, in essentially the same manner and should establish a parallel between the powers that could be exercised by a local and a foreign representative. It was proposed that article 16 should be redrafted to the effect that, upon recognition, the foreign representative would be given the same rights and prerogatives in respect of the assets of the debtor as were provided in local law to a local representative. In response it was said that article 16 was aimed at establishing a minimum catalogue of effects of foreign main proceedings, which would apply uniformly in all States that enacted the Model Provisions. That aim would not be achieved if the effects of the recognition varied from country to country depending upon the national law.

Paragraphs (1) and (2)

29. It was noted that article 16 contained provisions intended to protect the interests of all creditors by staying individual actions and suspending the transfer of assets of the debtor. As regards the scope of the stay of actions in paragraph (1)(a), it was also noted that article 16 was only intended to avoid dissipation of the debtor's assets that would result from individual actions against the assets of the debtors being allowed to run simultaneously to the foreign proceedings. Article 16(1)(a) was not intended, however, to prevent the opening of a local collective proceeding. The Working Group was reminded that those provisions had been the object of extensive discussions in previous sessions of the Working Group, during which a consensus had arisen as to the need for the measures listed therein (A/CN.9/433, paras. 115-126).

30. The question was asked whether the stay of individual actions applied only to proceedings that had been opened pursuant to a definite decision, or whether it applied also in case of proceedings opened on an interim basis. In particular, there was a concern that the mandatory effect in article 16 might not be appropriate in the case of a foreign proceeding that had been commenced only on an interim basis. In response it was noted that the stay of individual actions was to apply in both situations, since both types of proceedings were encompassed by the definition of foreign proceedings contained in article 2(a).

31. It was observed that article 16 did not address the question whether national rules on the limitation period for the commencement of individual actions would still apply to actions stayed pursuant to paragraph (2)(a). In the absence of such a rule, and with a view to avoiding adverse effects to creditors affected by the stay under paragraph (1)(a), it was suggested that an additional paragraph should be added to article 16 to authorize the commencement of individual actions to the extent that it was necessary to preserve claims against the debtor.

32. It was suggested that paragraph (1)(b) should expressly refer to the suspension of the "debtor's" right to transfer its assets, so as to make it clear that the provisions did not affect the rights of certain categories of secured creditors, such as mortgagees, might have under some legal systems to realize their rights in those assets. For that purpose, it was suggested to add the words "of the debtor" between the words "the right" and the words "to transfer" in paragraph (1)(b).

33. Reservations were expressed with regard to the proposed amendment, which was felt to weaken the scope of the suspension under paragraph (1)(b). It was noted that paragraph (2) already made the stay and the suspension under paragraph (1)(a) and (b) subject to exceptions and limitations provided in national law. For those legal systems which exempted certain secured creditors from the suspension of transfers of assets, or which did not stay individual actions commenced by certain categories of creditors, it would be possible to maintain those exceptions under the authorization provided in paragraph (2). It was suggested that examples of those instances could be given in the guide to enactment, for the purpose of explaining the possible scope of application of paragraph (2).

34. The concern was expressed that an unqualified suspension of transfers of assets, as currently provided in paragraph (1)(b), might paralyse all transactions of the debtor in
the enacting State, thus forcing the debtor's establishment in that State into insolvency. Such a result would not be in the interest of the creditors, who might be better served by ensuring the continuation of the activities of such establishment. Therefore, it was suggested that the suspension of transfers of assets should not apply to transfers that occurred in the ordinary course of business, so as not to jeopardize the financial viability of the debtor's establishment in the enacting State.

35. In response it was noted that the question of transactions that occurred in the ordinary course of business had been discussed by the Working Group in previous sessions (A/CN.9/422, paras. 108 and 109, and A/CN.9/433, paras. 124 and 125). At its twentieth session, the Working Group had agreed that it would not be feasible to attempt to address that question in the draft Model Legislative Provisions and that the matter should be left to be treated as an exception or limitation that might be made to the scope of the suspension under paragraph (2) (A/CN.9/433, para. 125).

36. The Working Group considered the question of possible sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under article 16(1)(b). It was pointed out that the consequences of the violation of a statutory suspension of transfers varied greatly in different legal systems. Possible sanctions might include criminal sanctions, penalties and fines. In some systems, the acts themselves might be regarded as void or might be capable of being set aside pursuant to a court order.

37. It was noted, however, that these questions involved many complex issues which did not lend themselves to being addressed within the framework of the draft Model Provisions, such as the rights of third parties who acquired assets of the debtor. It was pointed out that, if included in the text, a provision on sanctions for the violation of the suspension of transfers of assets would need to be supplemented with exceptions, as provided in a number of legal systems, to protect the interests of third parties who in good faith acquired assets from an insolvent debtor without knowledge of the suspension of transfer of assets. Thus, it was generally felt that it would not be feasible to deal in the draft Model Provisions with the sanctions that might apply to the violation of article 16(1)(b). It was proposed that the guide to enactment should mention the possible different approaches taken by national laws, pointing out that an essential purpose of those sanctions was to facilitate recovery for the insolvency proceeding of any assets unduly transferred by the debtor and that, for that purpose, the avoidance of such transactions was more effective than the imposition of criminal or administrative sanctions on the debtor.

Paragraph (3)

38. It was observed that, unlike paragraph (1), which dealt with mandatory effects of the recognition of the foreign main proceeding, paragraph (3) dealt with measures that could be granted at the discretion of the court recognizing the foreign proceeding, under the conditions provided therein. Thus, it was proposed that the rule contained in paragraph (3) would be more appropriately placed in article 17.

39. Various interventions were made concerning the question of ensuring adequate protection of the interests of local creditors within the context of paragraph (3). The view was expressed that, as currently drafted, paragraph (3) did not afford adequate protection to the interests of local creditors, and might induce local creditors to commence a local proceeding, so as to preclude a turnover of the assets to the foreign representative for realization and distribution in the foreign proceeding, or for the purpose of securing the privileges enjoyed by their respective classes of claims under the insolvency laws of the enacting State.

40. The Working Group considered the importance of elaborating provisions that ensured adequate protection of the interests of all creditors, including creditors in the enacting State. However, the Working Group was urged to consider such protective measures in a manner that ensured the equality of creditors, rather than establishing a preferential treatment of local creditors to the detriment of foreign creditors.

41. As regards the minimum waiting period in paragraph (3) for the permission to turn over assets to the foreign representative, the view was expressed that such a period was necessary to protect the interests of local creditors, by affording them the opportunity to file claims or to request the opening of a local insolvency proceeding prior to the turnover of assets to the foreign representative.

42. Another view, however, was that the minimum period in paragraph (3) created more problems than it solved. It was pointed out that paragraph (1)(a) suspended the debtor's right to transfer or encumber any of its assets upon recognition of a foreign main proceeding, but that the recognition did not, in and of itself, place the debtor's assets and affairs under the control and the supervision of the court of the enacting State. In the circumstances, the concern was expressed that during the period contemplated in paragraph (3), uncertainties would arise as to who was responsible for the management of the debtor's assets in the enacting State. It was therefore suggested that no minimum period should be provided in paragraph (3).

43. The view was also expressed that establishing a delay for the turnover of assets to the foreign representative, as provided in paragraph (3), did not constitute an effective measure to protect the interests of local creditors. It was felt that the protection of those interests might be better addressed by requiring that the creditors be given adequate notice of the recognition prior to the turnover of assets. A suggestion was made that a separate provision should deal with such notice requirements. Having considered those views, the Working Group agreed to delete the delay provided in paragraph (3).

44. For the purpose of clarifying the scope of application of paragraph (3), it was suggested that the words "located in this State" should be added after the words "the assets".
45. Questions were raised as to the purpose of the second sentence of paragraph (3), whereby the permission for the turnover of assets might only be given after the completion of any pending local proceeding. The view was expressed that such a rule, which was intended to protect the interests of local creditors, was excessively rigid. The interests of local creditors and of the creditors as a whole were not necessarily fostered by promoting the opening of parallel proceedings. Also, in some cases it might be in the interest of all creditors, local and foreign, to assemble all assets for realization and distribution in one single proceeding. It was instead suggested that it might be sufficient to provide that, in order to grant the turnover of assets, the court of the enacting State must be satisfied that the interests of local creditors were adequately protected. It was pointed out in that connection that a number of safeguards had been inserted in article 19 and that the cooperation mechanisms provided in chapter V could also play a role in protecting the collective interests of the creditors, foreign or local. Those provisions could be developed further so as to address the concerns expressed in the Working Group.

46. After consideration of the various views expressed, the Working Group found the substance of article 16 to be generally acceptable and referred it to the drafting group to prepare a revised draft that reflected the above discussion. (For the subsequent decision to include the substance of paragraph (3) in article 17, see paragraph 59, below).

Footnote “c”

47. It was felt that the option provided in footnote “c” did not represent a realistic alternative. It was thus agreed to delete it.

Footnote “d”

48. The Working Group noted that the two options provided under footnote “d” made it possible to subject the effects of paragraph (1)(a) or to exceptions and limitations provided in the law of the foreign main proceeding either in addition to, or in lieu of, the exceptions and limitations provided under the laws of the enacting State. It was generally felt that both options should be deleted, as they rendered difficult the application of article 16, by requiring the court of the enacting State to examine possibly complex rules of foreign law. Also, both options might weaken the scope of the stay and the suspension provided in paragraph (1) by authorizing the importation of restrictions not otherwise provided in the laws of the enacting State.

Article 17. Relief upon recognition of a foreign main or non-main proceeding

49. The text of the article, as considered by the Working Group, read as follows:

“(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of the debtor or the interests of creditors, the court may, upon the request of the foreign representative, grant any appropriate relief including:

“(a) staying the commencement or continuation of individual actions or proceedings concerning the debtor’s assets, rights, obligations or liabilities, to the extent they were not stayed under article 16(1)(a);

“(b) suspending the transfer, disposal or encumbrance of any assets of the debtor, to the extent they were not suspended under article 16(1)(b);

“(c) extending relief granted under article 15;

“(d) compelling testimony or the delivery of information concerning the assets and liabilities of the debtor;

“(e) entrusting the preservation and management of the assets of the debtor to the foreign representative or another person designated by the court;

“(f) granting other relief that may be available under the laws of this State.”

“(2) The court may refuse to grant relief in respect of a foreign non-main proceeding if such relief would interfere with the administration of a foreign main proceeding.”

“The enacting State may wish to consider the following alternative wording to replace subparagraph (f):

“(f) granting other relief that may be available under the laws of this State or the laws of the State where the foreign proceeding is taking place.”

General consideration

50. Interventions were made favouring the establishment of a hierarchy between foreign representatives in the sense that a representative of a foreign main proceeding should have precedence over a representative of a foreign non-main proceeding and that, if need be, precedence should be established also among several foreign non-main representatives. Furthermore, it was said that a representative of a non-main proceeding (whose authority was typically restricted to the assets in the State where the non-main proceeding had been opened) should be able to obtain relief only insofar as it pertained to the assets covered by that proceeding. Thus, it was argued, the representative of a non-main proceeding should not be able to obtain relief covered by subparagraphs (a) and (b) (stay of actions and suspension of transfers of assets) (stay of actions and suspension of transfers of assets). Such representative would in normal circumstances only require information relating to the assets covered by the foreign non-main proceeding or would seek measures aimed at repatriating assets that were improperly removed from the State of the non-main proceeding.

51. In view of the above considerations, one of the suggestions made was that the article should envisage a restricted catalogue of relief for non-main proceedings as compared to main proceedings; in particular, the relief under paragraph (1)(a) and (b) should not be available to a representative of a foreign non-main proceeding. Another suggestion was that the article should express only the purpose of the granting of relief, without giving a list of relief available to different types of foreign representatives. A further suggestion was that the granting of relief under article 17 should be made subject to the requirements,
limits and procedures of the law of the enacting State and that that idea should be expressed by adding at appropriate

52. The last suggestion was objected to since it was implicit, by virtue of the discretionary nature of the relief under article 17, that the court would, in deciding whether to give relief and how broad should the relief be, have regard to its own law. Also, such a restriction was unnecessary in view of article 19, which permitted modification and termination of relief. In addition, the list of possible relief enumerated in subparagraphs (a) to (e) was a minimum list and the court should not be prevented from granting relief if that was found to be useful and fair. Furthermore, distinguishing relief on the basis of a distinction between main and non-main proceedings (or between more than one non-main proceeding) was not appropriate since the distinction was based more on the scope than on the quality of proceedings.

53. After exhaustive consideration, the Working Group reached the consensus that, indeed, the interests and the authority of a representative of a foreign non-main proceeding were typically narrower than the interests and the authority of a representative of a foreign main proceeding (who normally sought to gain control of all assets of the insolvent debtor). However, instead of differentiating the list of relief available to those representatives, it was considered preferable to express those differences by including a wording in the article that would make it clear that, in granting relief under article 17 to a representative of a foreign non-main proceeding, the court had to be satisfied that the relief related to assets falling under the authority of that representative or that it concerned information required in the foreign non-main proceeding.

Subparagraph (a)

54. It was suggested that the measure granted under subparagraph (a) should not prevent a creditor from initiating an action to preserve a right and that the stay should be restricted to the enforcement of rights. It was also suggested that individual actions commenced before recognition should be allowed to continue. According to that view, a stay under the subparagraph might be in conflict with the fundamental right of each person to seek in courts the protection of its rights. That fundamental right, it was said, should be safeguarded in the context of article 17 as well as in the context of "automatic" stay under article 16 (see paragraph 22, above). The Working Group, however, adopted the view that the discretionary nature of the measure under the subparagraph, as well as the possibility to modify the measure under article 19, provided ample room to give effect to those concerns. Furthermore, the relief might be necessary to provide temporary respite to the foreign representative to organize the affairs of the debtor and not be distracted by having to participate in possibly numerous actions against the debtor.

Subparagraph (d)

55. It was agreed to add in subparagraph (d) a reference to information about the debtor's "affairs" or "business dealings" since access to such information, which was not expressly covered by the current wording, might be essential for carrying out the tasks for which the foreign representative was given authority.

Subparagraph (e)

56. It was agreed to permit expressly the court to sell the debtor's assets, a relief that was only implicitly covered by subparagraph (e). Such realization of assets might be necessary, for instance, as part of the continuing business activities of the debtor, or to pay the wages of employees.

Subparagraph (f)

57. Subparagraph (f) was considered by some to be too broad and open-ended in that it did not give an indication or limitation as to the kinds of other relief that could be granted under the article. One proposal was to make the list more focused by adding words such as "relating to administration, realization or distribution of assets"; another proposal was to broaden the list of relief enumerated in paragraph (1), which would make it possible to delete subparagraph (f). A further proposal was to restrict the relief to that available to the insolvency administrator in the enacting State. The Working Group adopted that last proposal.

Existence of local insolvency proceedings

58. It was considered that a pending insolvency proceeding in the enacting State should be an obstacle to granting relief to the foreign representative under article 17. In such a case, the foreign representative should be referred to the participation in the local proceeding, to requesting relief therein and to any assistance that might be available under article 21 (on cross-border judicial cooperation). It was proposed that the Model Provisions should expressly provide that relief of the types enumerated in article 17 should be available to the foreign representative in the context of the insolvency proceeding in the enacting State. The Working Group deferred the discussion of how to treat such concurrent proceedings to the consideration of chapter V (see paragraphs 185-200, below).

"Turnover" of assets to the foreign representative

59. The Working Group recalled its considerations regarding article 16(3), which empowered the court to permit the foreign representative to realize and distribute assets located in the enacting State (see paragraphs 38-46, above). It was agreed that that type of relief was not automatic and that for that reason it should be included in article 17. The drafting group was entrusted with preparing a draft paragraph that expressed the idea that, before entrusting the foreign representative (or another person) with the distribution of assets, the court had to be satisfied that the interests of creditors in the enacting State were adequately protected.
Paragraph (2)

60. In view of the decision to provide a restrictive guideline for the granting of relief to foreign non-main proceedings (paragraph 53, above), the provision (currently referring to avoiding interference with a foreign main proceeding) was considered unnecessary.

61. It was suggested that, in granting relief under article 17, the court should also be admonished to prevent interference or disturbance of a proceeding in the enacting State. That point, however, was left to be taken into account in the discussion of concurrent proceedings under chapter V (see paragraphs 185-200, below).

"Paulian actions"

62. The Working Group considered the right of the foreign representative to initiate actions to reverse or render unenforceable legal acts detrimental to creditors (sometimes referred to as "Paulian actions"), on the basis of a new draft article suggested by the Secretariat (ACN.9/WG.V/WP.48, note 2 to draft article 17) along the following lines:

"A foreign representative has the right to initiate, under the conditions of the law of this State, an action to reverse or render unenforceable legal acts detrimental to all creditors."

63. Varying views were expressed as to the desirability of including a rule such as the one contained in the above-quoted provision. According to one view, the issue in question was of great complexity and would not lend itself to a harmonized solution within the framework of the draft Model Provisions. The prevailing view, however, was that a provision on the subject was needed in the draft Model Provisions. The right to commence actions to reverse or render unenforceable legal acts detrimental to all creditors was essential to protect the integrity of the assets of the debtor, in the interest of all creditors. Such right should not be denied to a foreign representative, as might be implied by the absence of an express provision on the subject. It was understood that the provision was intended to relate to the conferring of standing to bring actions and not to the creation of substantive rights.

64. The question was asked whether the phrase "under the conditions of the law of this State" referred to procedural rules of the enacting State governing those actions, or to the substantive law applicable to those actions. The view was expressed that the question of the applicable law to determine the requirements and other substantive rules for the commencement of those actions should be left for the rules on the conflict of laws of the enacting State.

65. The meaning of the words "reverse or render unenforceable" was found to be unclear and it was suggested to use instead the words "avoid or otherwise render ineffective", which were words used technically in a number of legal systems.

66. Regarding the scope of those actions, it was noted that in some legal systems the right to commence such actions might be provided in general rules and principles of law, such as the Civil Code, or might derive from specific statutory provisions of insolvency law. In the first case any affected creditor had the right to initiate those actions, while in the latter case that right was usually reserved in principle to the insolvency administrator. It was suggested that the additional provision should refer only to actions that were available, according to the law of the enacting State, to the local insolvency administrator in the context of insolvency proceedings in the enacting State.

Article 18. Notice of recognition and relief granted upon recognition

67. The text of the article, as considered by the Working Group, read as follows:

"[The foreign representative shall] [When the court recognizes a foreign main or non-main proceeding pursuant to article 13(3), it shall order the foreign representative to] give notice of the recognition, of the stay and suspension as provided in article 16(1) and of any relief granted under article 17(1) within _ days to all known creditors that have an address in this State. Such notice shall be given in the form required by the law of this State. [The obligation] [The order] to give notice does not suspend the effectiveness of the recognition or the relief."

68. The need for a specific provision on notice was questioned, and it was suggested that it might be sufficient to provide, similarly to articles 21 and 22 of the European Union Convention on Insolvency Proceedings, that the foreign representative had to comply with local publication procedures. In response it was noted that not all legal systems required notice of recognition of foreign proceedings and other court measures that followed recognition and that, therefore, a specific provision on the subject was necessary.

69. Reservations were expressed with regard to the scope of the notice requirements provided in article 18, which were found to be excessive. Various interventions were made in favour of limiting those requirements to providing notice of the recognition of the foreign proceeding and of the effects of that recognition, if required by local law. If local law also required notice to be given of any relief granted under article 17, or where the court found such notice to be necessary, the provision of such notice might still be ordered by the court, as a condition for granting the relief, pursuant to article 19(3).

70. Questions were asked as to who should bear the cost of the notice required to be given under article 18. In response it was said that that question should be left for the procedural rules of the enacting State and that nothing in article 18 prevented the court of the enacting State from ruling that the foreign representative should bear such costs.

71. The meaning of the last sentence of article 18 was found to be unclear and it was proposed to delete the sentence. In reply it was said that the last sentence of article 18 had been suggested so as to make it clear that the manda-
tory effects of the recognition, as well as any relief granted by the court under article 17, would be immediately operative and should not await the provision of notice to creditors and other interested parties under article 18. However, if article 18 was to be limited to requiring notice of the recognition, that sentence might no longer be needed.

Article 19. Protection of creditors and the debtor

72. The text of the article, as considered by the Working Group, read as follows:

"(1) In granting or denying relief under [articles 15, 16 or 17] [this Law], the court must be satisfied that creditors collectively and the debtor are protected against undue prejudice and will be given a fair opportunity to assert their claims and defences.

"(2) Upon request of a person or entity affected by relief under articles 15, 16 or 17, the [competent] court may [deny,] modify or terminate such relief.

"(3) The court granting relief to the foreign representative may subject such relief to conditions it considers appropriate."

Paragraph (1)

73. Various objections were raised to the reference made to article 16 in paragraph (1). It was noted that article 16 dealt with mandatory effects of the recognition of a foreign main proceeding, and not with relief measures granted at the discretion of the court. It was noted that, as currently drafted, the provision expanded the discretion of the court of the enacting State in a manner that might not be acceptable to a number of legal systems and would not be conducive to greater legal certainty, which was one of the purposes of the draft Model Provisions.

74. Reservations were voiced with regard to the use in paragraph (1) of the words "undue prejudice", which were found to be of difficult interpretation in a number of legal systems. It was proposed that paragraph (1) should instead require the court of the enacting State to take into account the interests of all creditors, the debtor and other interested parties when granting relief under articles 15 and 17. In that connection, it was suggested that paragraph (1) should expressly refer to the protection of the interests of local creditors. One way of achieving that result might be to provide that the opening of a local proceeding would preclude granting relief under article 15 or 17 or terminate any relief previously granted by the court.

75. In response to that suggestion it was noted that such a provision would in fact prompt the opening of a local proceeding, a result which might not always be in the interests of all creditors, including local creditors. Besides, such a rule might require that the draft Model Provisions include a definition of local creditors, which would be difficult to formulate. As the purpose of article 19 was to ensure the protection of the interests of all creditors, without favouring any specific category, it was suggested that the proposed amendment should not be adopted.

Paragraph (2)

76. Objections were raised with regard to the possibility that the court of the enacting State might modify or terminate the mandatory effects of the recognition of a foreign main proceeding under article 16. Such a provision was found to be appropriate only in respect of discretionary relief granted under articles 15 and 17. General or ad hoc exceptions to article 16 should be dealt with within the context of that provision.

77. In response it was said that paragraph (2) was intended to provide persons that might be adversely affected by the stay or the suspension under article 16(1) with an opportunity to be heard by the court of the enacting State. Such a safeguard was needed in the draft Model Provisions, so as to enable the court of the enacting State to deal with exceptional hardship situations, particularly in jurisdictions where no rule similar to article 16(1) was in place. Furthermore, even in legal systems where the opening of insolvency proceedings produced the effects listed in article 16(1), the courts were sometimes authorized to make individual exceptions upon request by the interested parties, under conditions prescribed by local law.

Paragraph (3)

78. It was suggested that paragraph (3) should be placed immediately after paragraph (1), so as to make it clear that the conditions referred to therein related to discretionary relief provided under articles 15 and 17, and not to modification or termination of relief under paragraph (2).

Article 20. Intervention by a foreign representative in actions in this State

79. The text of the article, as considered by the Working Group, read as follows:

"Upon recognition of a foreign proceeding, the foreign representative may intervene in actions in which the debtor is a [party][claimant or defendant] under the conditions of the law of this State."

80. It was said that, from the viewpoint of some national laws, the word "intervene" in the context of article 20 was unclear. In reply, it was stated that the word as used in the article did not present any difficulty of interpretation for other legal systems. The understanding was expressed that the purpose of the provision was to give the foreign representative standing to appear in court and to make representations in individual actions by the debtor against a third party or by a third party against the debtor. It was pointed out that many if not all national procedural laws contemplated cases where a party (the foreign representative in the current provision) who demonstrated a legal interest in the outcome of a dispute between two other parties was permitted by the court deciding the dispute to be heard in the proceedings. National procedural systems referred to such situations by different expressions, among which the expression "intervention" or similar expressions were frequent.
81. However, the view was also expressed that, for those legal systems where the words “to intervene” were not well understood, those words might be given a different interpretation, and in particular that they might carry the meaning that the foreign representative might substitute for the debtor in judicial actions. In response, it was emphasized that the words “to intervene”, as used in article 20, did not mean “to substitute”.

82. After consideration of the different views expressed, the Working Group agreed to retain the words “to intervene” and to include in the guide to enactment an explanation indicating that, if the enacting State used another expression for that concept, the use of such other expression in enacting article 20 would be appropriate.

83. With a view to clarifying the relation between articles 16 and 20, it was suggested that article 20 should limit the foreign representative’s right to intervene in actions that had not been stayed under article 16(1). The suggested clarification was not adopted by the Working Group since it was considered self-evident.

84. It was also suggested that the right to intervene should be available only to the representative of a foreign main proceeding. The prevailing view, however, was that also the representative of a foreign non-main proceeding could have a legitimate interest in the outcome of a debtor’s dispute between the debtor and a third party and that the provision should not exclude that possibility.

**Chapter IV. Cooperation with foreign courts and foreign representatives**

**Article 21. Authorization of cooperation and direct communication with foreign courts and foreign representatives**

85. The text of the article, as considered by the Working Group, read as follows:

“(1) In matters referred to in article 1, courts of this State shall cooperate to the maximum extent possible with foreign courts and foreign representatives. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

“(2) In matters referred to in article 1, a [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] shall, within its authority, cooperate to the maximum extent possible with foreign courts and foreign representatives. The [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] is permitted, within its authority, to communicate directly with foreign courts or foreign representatives.

“(3) Cooperation may be implemented by any appropriate means, including:

“(a) appointment of a person to act at the direction of the court;

“(b) communication of information by any means deemed appropriate by the court;

“(c) coordination of the administration and supervision of the debtor’s assets and affairs;

“(d) approval or implementation by courts of arrangements concerning the coordination of proceedings;

“(e) [the enacting State may wish to list additional forms or examples of cooperation].”

**General consideration**

86. Statements were made that judicial cooperation in general, including cooperation in insolvency matters, was governed by bilateral or multilateral treaties, which typically provided for cooperation based on reciprocity. For some States it was doubtful whether a workable framework for judicial cooperation could be established exclusively by way of a national statute, in particular since it was difficult to incorporate in it the concept of reciprocity. It was mentioned that, outside the framework of a treaty, a possible way of assuring a form of reciprocity was for a State to use the “annex X States” approach, a technique, also envisaged in footnotes “c” and “d” to article 16 (see paragraph 24, above), according to which cooperation was promised only with respect to courts from States that were listed in an annex to the national law governing cooperation.

87. The widely prevailing view, however, was that a provision such as the one contained in article 21 was useful since many States considered themselves in a position to provide in a national statute for a meaningful cross-border judicial cooperation, including cooperation in insolvency matters. To the extent such cooperation was based on principles of comity among nations, the enactment of the Model Provisions, including its article 21, offered an opportunity for making that principle more concrete and adapted to the particular circumstances of cross-border insolvencies.

88. In that connection it was recalled that the conclusion by the Working Group at its previous session was that the adoption of the Model Legislative Provisions by the Commission “would not exclude the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency, if the Commission at a later stage so decided” (A/CN.9/433, para. 20).

89. The Working Group, having heard those views, proceeded to discuss article 21, recalled its earlier view that reciprocity was a concept to which no single solution could be easily provided (A/CN.9/433, para. 19) and decided that the concept should not be addressed in the Model Provisions.

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

90. While it was accepted that the article should cover cooperation between courts as well as that between insolvency administrators, it was agreed that paragraphs (1) and (2) should make it clear that an insolvency administrator
acted under the overall supervision of the competent court, the purpose of which was to ensure fairness, protection of creditor’s interests and protection of confidential information. It was stressed, however, that any modification of the provision should not inadvertently suggest that ad hoc authorization would be needed for each act by the administrator, which would be contrary to practice.

91. In order to implement those considerations, it was suggested to state in paragraph (1) that the competent court in the enacting State should cooperate with foreign courts “either directly or through” an insolvency administrator. In addition, it was proposed that, in describing the limits of the administrator’s authority in paragraph (2), the expression “within its authority” should be replaced by words such as “in the exercise of its functions and subject to supervision of the court”.

Paragraph (3)

92. It was suggested to include in subparagraph (b) or at another appropriate place in the article a provision to the effect that cooperation and communication of information had to be “subject to the rules restricting the communication of information” (a proviso modelled on article 31(1) of the European Union Convention on Insolvency Proceedings). The opposing view was that the duty to observe the confidentiality of information was one of various obligations to which cooperation was subject. Also, since the Model Provisions were not a self-contained set of rules, those obligations applied without being mentioned in the article. Thus it was preferable not to deal with those obligations in the article.

93. In subparagraph (c), the Working Group did not adopt the suggestion to split the provision into two, one dealing with the administration of the proceedings and the other with supervision of the proceedings. An observation was made that the provision of subparagraph (c) was different from the others in that it expressed the result to be achieved rather than the means to achieve it.

94. The Working Group decided to replace in subparagraph (d) the word “arrangement”, considered to be unclear, with the word “agreement” or a similar term. A suggestion was made to include at the end of subparagraph (d) words along the lines of “realization of assets, payment of creditors’ claims and other aspects of proceedings”. Those words were said to be necessary to make it clear that, in order to achieve the purpose of article 23, it was necessary to coordinate the amounts paid to creditors and the timing of payments. No support was expressed for that suggestion.

Concurrent proceedings

95. A proposal was made to make express reference in paragraph (3) to instances of concurrent proceedings by including a new subparagraph (d bis) that might be along the lines of “coordination of multiple proceedings regarding the same debtor” or “coordination of main, non-main and local proceedings in respect of the same debtor”. While support was expressed as to the substance of the proposal, it was said that the Model Provisions should treat more exhaustively various aspects of concurrent proceedings. The Working Group agreed to consider those matters in the context of its discussion of chapter V (see paragraphs 185-200, below). In addition, it was said that it would be desirable to include in article 21 criteria to guide the court in cooperating with foreign courts and representatives.

Article 23. Rate of payment of creditors

96. The text of the article, as presented to the Working Group, read as follows:

“Without prejudice to [secured claims] [rights in rem], a creditor who has received partial payment in respect of its claim in an insolvency proceeding opened in another State may not receive a payment for the same claim in a proceeding opened in this State under [...] insert names of laws of the enacting State relating to insolvency] with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding opened in this State is proportionately less than the payment the creditor has already received.”

97. For lack of time, the Working Group did not discuss article 23 at the current session.

98. For further discussions relating to concurrent proceedings, see paragraphs 185-200, below.

PREAMBLE

99. The text of the preamble, as considered by the Working Group, read as follows:

“The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

“(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

“(b) greater legal certainty for trade and investment;

“(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested parties;

“(d) protection and maximization of the value of the debtor’s assets; and

“(e) facilitation of the rescue of financially troubled businesses [thereby protecting investment and preserving employment].”

100. The substance of the preamble was approved, subject to reference in subparagraph (c) also to the debtor as a party whose interests were to be protected and subject to retention of the words that were currently between the square brackets in subparagraph (e).

Chapter I. General provisions

Article 1. Scope of application

101. The text of the article, as considered by the Working Group, read as follows:
Another suggestion was to delete subparagraph (a). It was argued that, for the sake of completeness, that situation was not the function of the draft Model Provisions elsewhere in the draft Model Provisions. It was pointed out that, although intended to perform an explanatory function only, article 1 might be interpreted as limiting the scope of the remaining articles of the draft Model Provisions. Furthermore, it was considered to be unusual for a legislative text to define its own scope of application by providing examples of situations covered by its provisions. It was suggested that if an explanatory provision was needed at all in article 1, it would be preferable to formulate it in general terms, along the following lines: "This [Law] [Section] applies to situations of cross-border insolvency and related proceedings dealt with in the following articles." In response it was proposed to retain the current text of article 1, as some States might find it useful to provide such explanation of the scope of the draft Model Provisions. Those States that did not find the article necessary could eliminate it when implementing the Model Provisions.

103. It was suggested that the guide to enactment should explain the meaning of the word "assistance" as used in subparagraphs (a) and (b).

104. It was proposed to add a new subparagraph that would refer to the situation where creditors or other interested parties in the enacting State had an interest in requesting the opening of an insolvency proceeding in a foreign State or an interest in participating in such a proceeding. It was argued that, for the sake of completeness, that situation should be covered in article 1, since subparagraph (d) covered the "mirror" situation (viewed from the perspective of foreign creditors or other foreign interested parties).

105. It was suggested to include in subparagraph (b) the subjects who might seek assistance in a foreign State, so as to align the style of the subparagraph with subparagraph (a). Another suggestion was to delete subparagraph (b) since the rights of the creditors in the enacting State were dealt with in other bodies of law such as contract law and since it was not the function of the draft Model Provisions to touch upon or encourage the pursuit of those rights abroad. A further suggestion was that another situation possibly to be covered in the article was where, after the conclusion of the insolvency proceeding in a foreign State, assets pertaining to the debtor emerged in the enacting State and the foreign creditors sought to seize those assets. It was also proposed to delete subparagraph (d) since it either overlapped with subparagraph (a) or highlighted a principle that was already contained in national laws.

106. As the proposals for modification of the article did not attract sufficient support, the Working Group approved the substance of article 1.

Article 2. Definitions and rules of interpretation

107. The text of the article, as considered by the Working Group, read as follows:

"For the purposes of this Law:"

"(a) 'foreign proceeding' means a collective judicial or administrative proceeding, including a proceeding opened on an interim basis, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) 'foreign main proceeding' means a proceeding taking place in the State where the debtor has the centre of its main interests;

(c) 'foreign non-main proceeding' means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (g) of this article;

(d) [(c)] 'opening of a foreign proceeding' is deemed to have taken place when the order opening the proceeding becomes effective, whether or not [final] [subject to appeal];

(e) [(b)] 'foreign representative' means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(f) [(d)] 'court' in reference to a foreign court means a judicial or other authority competent to carry out functions referred to in this Law;

(g) [(e)] 'establishment' means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

General remarks

108. A suggestion was made to place article 2 before article 1, since the latter provision employed some of the terms defined in article 2. In response it was pointed out that in some legal systems a provision on the scope of application of a legislative text usually appeared before any other provision. In any event, enacting States remained free to reverse the order of articles 1 and 2.
109. It was pointed out that the word “insolvency”, which was given a broad meaning in the draft Model Provisions, had a narrower connotation in some languages. It was thus suggested that a definition of “insolvency” should be included in article 2 or, alternatively, that a different word should be used in those languages. The Working Group felt that it would not be feasible to attempt to formulate a definition of “insolvency” and requested the secretariat to review the language versions of the draft Model Provisions so as to find appropriate wording in respect of those languages in which difficulties had been identified.

Subparagraph (a)

110. In response to questions concerning the need for a reference to interim proceedings in subparagraph (a), the Working Group reiterated its agreement that reference to those proceedings should be made in paragraph (a) (A/CN.9/433, paras. 38 and 39). It was agreed that the words “interim proceedings” should substitute for the words “proceeding opened on an interim basis”.

111. It was suggested that the words “affairs of the debtor” were not sufficiently clear and that “affairs” should be qualified as being of a “financial” or “commercial” nature. In response it was noted that the adjective “financial” had a narrow meaning in a number of legal systems, as related to transactions with currency, securities or stocks in the financial market. Also the adjective “commercial”, which was used in some legal systems to refer to transactions covered by a particular body of law, was referred to as “commercial law”, might be interpreted as excluding certain categories of debtors whose transactions were not qualified as “commercial affairs” in those legal systems.

Subparagraph (d)

112. Noting that the draft Model Provisions also covered situations where the proceedings were commenced pursuant to a corporate act from which followed consequences determined by the law (A/CN.9/433, para. 39), the Working Group referred subparagraph (d) to the drafting group to provide alternative language to the words “order opening the proceeding”. (Subsequently, the drafting group suggested deletion of the subparagraph.)

Subparagraph (g)

113. In response to questions concerning the need for retaining the definition of “establishment” contained in subparagraph (g), it was recalled that the Working Group had previously agreed on the need for providing such definition (A/CN.9/433, para. 41). One suggestion made to clarify subparagraph (g) was to delete the words “with human means and goods”, as they might be interpreted as excluding certain enterprises such as those operating in a strictly electronic environment. Another suggestion was to define “establishment” as a place of operations other than the centre of the debtor’s main interests. After consideration of those suggestions, the Working Group agreed on retaining the definition contained in subparagraph (g), which followed a similar definition provided in article 2(h) of the European Union Convention on Insolvency Proceedings.

Article 3. International obligations of this State

114. The text of the article, as considered by the Working Group, read as follows:

“To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.”

115. It was observed that cooperation between States, including cooperation between judicial bodies, was frequently addressed in bilateral or multilateral conventions and other forms of agreements binding States, such as diplomatic protocols or exchanges of diplomatic notes. It was also observed that, for example, article 13(6), which dispensed with the requirement of legalization of documents, or article 21, which allowed courts to communicate directly, might be overridden by international agreements that dealt with the legalization of documents or with communication between courts. It was suggested that, in order to avoid an unnecessarily broad effect of international agreements, it might be useful to provide expressly that the Model Provisions were overridden only where the treaty or convention in question regulated matters covered by the Model Provisions; another proposed solution was to provide that the Model Provisions did not alter international obligations of the enacting State in matters of cross-border insolvency.

116. While some support was expressed for modifying the article as suggested, one view was that the article should be deleted because it either stated what applied anyway or because it was not for a (model) national statute to deal with matters that concerned the hierarchy among legislative acts, an issue that had constitutional implications. Some proponents of that view suggested that the issue be explained in the guide to enactment.

117. Strong support was expressed for the deletion of the article. Nevertheless, in view of its usefulness for a number of States, it was decided to keep it for the time being.

Article 4. Competent [court] [authority]

118. The text of the article, as considered by the Working Group, read as follows:

“The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts or authority competent to perform those functions in the enacting State].”

“A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

“Nothing in this Law affects the provisions in force in this State governing the authority of [insert the designation of the government-appointed person or body].”
119. It was agreed that the title of article 4 should read "competent authority", an expression which was found to be sufficiently broad to encompass also reference to the competent court of the enacting State.

120. The view was expressed that article 4 contained a definition of the competent authority and that, therefore, the provision should be moved to article 2. In reply it was noted that the provision in article 4 was not a mere definition, as it allowed the enacting State to indicate the authority competent to carry out the functions referred to in article 4. It was important to keep article 4 as a separate provision since it helped the foreign representative identify the authority to which he or she had to submit a request for recognition or cooperation.

121. For purposes of clarity, a suggestion was made to include in the article, after the words "foreign proceedings", the words "and of a foreign representative". The suggestion was not adopted, as it was considered that the recognition of a foreign representative was already covered by reference to the recognition of a foreign proceeding.

122. It was suggested to incorporate in the text of the article the reference to government-appointed officials or bodies who in some States exercised certain functions relating to insolvency proceedings, which was contained in the footnote to the current text. The view was expressed that, for purposes of clarity, inclusion of a reference to those officials in the text of the article was more appropriate than the negative formulation contained in the footnote. The prevailing view, however, was that reference to those officials should be retained in the footnote, as an option for those States to which the footnote applied, since a number of States did not have those categories of officials. In order to clarify the scope of the footnote, the guide to enactment should provide examples of the categories of government-appointed officials referred to in the footnote.

Article 5. Authorization of a person body adminstering a liquidation or reorganization under the law of the enacting State to act in a foreign State

123. The text of the article, as considered by the Working Group, read as follows:

"A person body administering a liquidation or reorganization under the law of the enacting State is authorized to act in a foreign State on behalf of a proceeding in this State under names of laws of the enacting State relating to insolvency, as permitted by the applicable foreign law."

124. The substance of article 5 was approved by the Working Group.

Article 6. Public policy exceptions

125. The text of the article, as considered by the Working Group, read as follows:

"Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."

126. The Working Group decided to delete the square brackets around the word "manifestly", so as to make it clear that the public policy exception was to be given a restrictive interpretation, as had been proposed at the twentieth session of the Working Group (A/CN.9/433, para. 160).

127. The Working Group was informed that some States, in enacting a public policy provision such as the one contained in article 6, might need to expressly construe the scope of such public policy exceptions as relating to fundamental principles of law, in particular the constitutional guarantees and individual rights.

128. A suggestion was made to redraft article 6 in a positive manner along the following lines: "The court may refuse to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State." The suggestion was objected to on the ground that the proposed wording might be interpreted as requiring the court to ascertain whether each individual request for relief or other action under the Model Provisions was not manifestly contrary to the public policy of the enacting State.

Chapter II. Access of foreign representatives and creditors to courts in this State

Article 7. Access of foreign representatives to courts in this State

129. The text of the article, as considered by the Working Group, read as follows:

"A foreign representative is entitled to apply directly to a competent court in this State for the purpose of obtaining any relief available under this Law."

130. There was general agreement in the Working Group that the purpose of the article was to allow direct access by the foreign representative to courts of the enacting State, thus freeing the foreign representative of formalities such as any diplomatic or consular channels. Views differed, however, as to whether such direct access applied only to the court referred to in article 4 or whether it covered also other courts that might be called upon to provide relief to the foreign representative (in particular in the context of article 15 dealing with pre-recognition relief).

131. According to one view, direct access should be restricted to the court referred to in article 4. It was said that providing direct access to all courts of the enacting State would be inconsistent with the scope of application of the Model Provisions, that it was unnecessary to include all courts of the enacting State under the preferential regime of article 7 and that such a broad rule might cause confusion when the foreign representative would be seeking relief in the enacting State.

132. Another view was that the article, while expressly providing direct access to the court specified in article 4, should make it clear that the Model Provisions did not deal
with, or restrict, the right to obtain relief from other courts in the enacting State when that was possible under local law.

133. According to yet another view, which eventually prevailed, the article should be limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, without dealing with the competence of the courts or with relief that they could grant. It was pointed out that the foreign representative might have to apply for relief to a court other than the court referred to in article 4 (for example, when the competence of the court was determined according to the location of the asset with respect to which provisional relief was sought).

Article 8. Limited jurisdiction

134. The text of the article, as considered by the Working Group, read as follows:

"The sole fact that a request pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the request."

135. The Working Group reaffirmed its position regarding that article, which had been expressed at its previous session (A/CN.9/433, paras. 69-70), and according to which the provision was a useful "safe conduct" rule aimed at ensuring that the court in the enacting State should not assume jurisdiction over the entire debtor's assets on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding. The substance of the article was approved subject to replacing the expression "a request" by the words "an application".

136. However, it was noted that in a number of States the article was not necessary, since their rules on jurisdiction did not allow a court to assume jurisdiction over an applicant on the sole ground of the applicant's appearance before the court.

Article 9. Request by a foreign representative for opening of a proceeding under [insert names of laws of the enacting State relating to insolvency]

137. The text of the article, as considered by the Working Group, read as follows:

"A foreign representative is entitled to request the opening of proceedings in this State under [insert names of laws of the enacting State relating to insolvency] if the conditions for opening such proceedings under the law of this State are met."

138. Interventions were made to suggest that the right to request the opening of insolvency proceedings should not be extended to a representative in a foreign non-main proceeding. It was pointed out that the opening of a proceeding might interfere with the administration of the main proceeding and that, in the interest of enhancing the cooperation and coordination in insolvency proceedings, only a representative in a foreign main proceeding should be granted that right.

139. However, pursuant to another view, which eventually prevailed, the proposed amendment should not be adopted, as it would render the article excessively rigid. In support of retaining the current wording, it was noted that a representative in a non-main proceeding might have a legitimate interest in requesting the opening of a proceeding in the enacting State, for instance, where no main proceeding within the meaning of the draft Model Provisions had been opened. Also, it was pointed out that the proposed limitation would not by itself avoid the opening of a local proceeding, since a representative in a non-main proceeding might easily circumvent the proposed rule by arranging for a creditor to submit the request for the opening of a local proceeding. Furthermore, it was noted that article 9 only gave standing to the foreign representative for making an application to the court, so that a request for the opening of a local proceeding would still need to be considered on its own merits.

140. The Working Group discussed at length the question whether the foreign representative's right to request the opening of insolvency proceedings in the enacting State should depend on recognition of the foreign proceeding.

141. Various interventions were made in favour of giving the foreign representative that right without requiring prior recognition. It was pointed out that, in practice, a request for the opening of a local insolvency proceeding might typically come into consideration at the initial stages of the foreign insolvency proceeding, often to secure control over the assets of the debtor. In such emergency situations, the foreign representative might not yet be in a position to comply with all the requirements of the enacting State for recognition of his or her status. Although article 13 represented an improvement to the existing system, in some jurisdictions the recognition might entail some delay and might not be available at the time needed by the foreign representative.

142. However, strong support was expressed for making the recognition of the foreign representative a necessary condition for the right to request the opening of insolvency proceedings in the enacting State. It was stated that an alleged urgent need for preserving the assets of the debtor did not constitute sufficient reason for giving the foreign representative the right to request the opening of insolvency proceedings prior to recognition. Article 15 already dealt with emergency situations by authorizing the court to grant provisional relief upon application for recognition.

143. It was further noted that the recognition was the procedure whereby the foreign representative was given standing before the courts of the enacting State for the purposes of the draft Model Provisions. Accordingly, the relief under article 16 was only available upon recognition, and the provisional relief provided in article 15 required at least the filing of an application for recognition. Thus, waiving the requirement of prior recognition in article 9 would bring that article into conflict with those other articles of the draft Model Provisions. Also, it would not be logical to allow a foreign representative not yet
recognized as such in the enacting State to request the opening of local proceedings under article 9, while at the same time requiring prior recognition for the foreign representative’s right to participate in existing proceedings under article 10.

144. In the course of the discussion, a number of suggestions were made so as to achieve a compromise between the two conflicting views expressed in the Working Group. One proposal was to waive the requirement for prior recognition in article 9, while providing that the foreign representative had to provide proof, satisfactory to the court, of his or her status in the State where the proceeding had originated. However, reservations were expressed to that proposal, which was held to establish an undesirable double system of recognition: a provisional recognition limited to the purposes of article 9, and full-fledged recognition for all other purposes of the draft Model Provisions. It was noted that article 13 provided minimum essential requirements for the recognition of a foreign representative and that it would not be appropriate to lower those standards for the purposes of article 9.

145. Another proposal was that article 9 should be redrafted to the effect that, provided adequate proof of the status of the foreign proceeding was given to the court, the foreign representative could request the recognition of a foreign proceeding or request the opening of a local proceeding, when no local proceeding already existed in respect of the debtor. That proposal, however, was considered to be excessively complex for the limited purpose of the article and did not attract sufficient support.

146. After considering all the views expressed and proposals made, and noting the lack of a consensus on the subject, the Working Group decided to insert the words "upon recognition," within square brackets at the beginning of article 9.

Article 10. Participation of a foreign representative in a proceeding under [insert names of laws of the enacting State relating to insolvency]

147. The text of the article, as considered by the Working Group, read as follows:

"Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding concerning the debtor in this State under [insert names of laws of the enacting State relating to insolvency]."

148. A suggestion was made to restrict the right of participation of representatives of foreign non-main proceedings to cases where the participation in the insolvency proceeding in the enacting State "relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding", the formulation proposed to be included in article 17 (see paragraph 53, above). The suggestion was not adopted since it would be difficult, or inappropriate, to link proposals of the foreign representative to particular assets.

149. The expression "to participate" was criticized as being unclear and not specifying which actions were covered by it. It was proposed to replace the expression "to participate" by the words "to intervene", which were used in article 20 to refer to the appearance by the foreign representative in individual actions brought by the debtor or against the debtor (see paragraph 79, above). The proposal was not adopted on the ground that the situation in article 10 (a collective insolvency proceeding) was fundamentally different from that of article 20 (individual action by or against the debtor); it was said that, because of the difference in the conditions for, and the nature of, the foreign representative’s appearance in the two situations, the use of the same expression would be confusing.

150. According to one view the provision could be made clearer if, instead of (or in addition to) the expression "to participate", language were used along the lines of "to be heard in an insolvency proceeding and to make proposals therein". That proposal was supported on the condition that the ways of participation in the proceedings were not listed exhaustively. However, the prevailing view was that the expression "to participate" should be retained, since it captured in a flexible way the various purposes for which the foreign representative might appear in an insolvency proceeding in the enacting State. It was considered that the guide to enactment should explain that, in enacting the article, the expression "participate" might have to be replaced by an expression which in that national law best expressed the intended meaning.

Article 11. Access of foreign creditors to a proceeding under [insert names of laws of the enacting State relating to insolvency]

151. The text of the article, as considered by the Working Group, read as follows:

"(1) Subject to paragraph (2), foreign creditors have the same rights regarding the opening of, and participation in, a proceeding in this State under [insert names of laws of the enacting State relating to insolvency] as creditors [that are citizens of this State or are resident, domiciled or have a registered office] in this State.

"(2) The provision in paragraph (1) of this article does not affect the ranking of claims in a proceeding under [insert names of laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than general (non-priority or non-preference) claims."

"The enacting State may wish to consider the following alternative wording to replace article 11(2):

"(2) The provision in paragraph (1) of this article does not affect the ranking of claims in a proceeding under [insert names of laws of the enacting State relating to insolvency] and the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than general (non-priority or non-preference) claims."

152. The view was expressed that the words "foreign creditors", as used in paragraph (1), were unclear, and that
criteria (such as nationality or domicile) were needed for establishing who would be regarded as a foreign creditor. As it was not realistic to attempt to formulate a uniform definition of those criteria, it was suggested to redraft paragraph (1) to the effect that all creditors should be treated in the same manner, without discrimination based on nationality or other grounds, except as provided in paragraph (2). In response it was pointed out that the reference to the same rights "regarding the opening of, and participation in, a proceeding" were needed so as to circumscribe the scope of the equal treatment under paragraph (1). It was, however, proposed that the words in square brackets in paragraph (1) were not needed and should be deleted.

153. In respect of paragraph (2), it was pointed out that in some legal systems the payment of certain categories of claims (such as fines and other pecuniary sanctions, or claims whose payment was deferred) were ranked lower than unsecured non-priority claims. It was suggested that paragraph (2), which placed foreign claims on equal footing with local non-priority claims, should be redrafted so as to make it clear that foreign claims would not receive better treatment than those local claims whose payment was deferred.

154. The word "general" in paragraph (2) was found to be unnecessary. It was suggested that it might be sufficient to refer to "non-priority or non-preference claims". The Working Group agreed to delete the word "general" as well as the parenthesis around the words "non-priority or non-preference".

155. It was noted that foreign tax and social security claims were not expressly excluded from the ambit of paragraph (2). Thus, strong support was expressed for retaining the option contained in the footnote, since a number of jurisdictions would have difficulties in enacting the Model Provisions if they did not expressly reserve the possibility for the enacting State to exclude foreign tax and social security claims.

156. The view was expressed that the article should confine itself to affirming the principle that, subject to the priorities of the law of the enacting State, all creditors should be granted the same rights irrespective of nationality, residence or domicile.

Article 12. Notification to foreign creditors of a proceeding under [insert names of laws of the enacting State relating to insolvency]

157. The text of the article, as considered by the Working Group, read as follows:

"(1) Whenever a notification of commencement of proceedings under [insert names of laws of the enacting State relating to insolvency] is required under the law of this State for creditors in this State, such notification shall be made to known creditors not resident, domiciled or with a registered office in this State.

"(2) Notification shall be made to the foreign creditors individually unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

"(3) The notification shall:

"(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

"(b) indicate whether secured creditors need to file their secured claims; and

"(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court."

General remarks

158. The view was expressed that, for the sake of consistency, the same meaning should be given to the notion of "foreign creditor" in articles 11 and 12. In response it was said that articles 11 and 12 had different purposes and that the Working Group was following a pragmatic approach by not providing a definition of "foreign creditors" and by dealing with that notion, in the few instances where it was mentioned, within the specific context of the provision to which it related.

Paragraph (1)

159. It was noted that one of the main purposes of the notification requirements under article 12 was to inform creditors of the time limit to file their claims and the form in which claims had to be filed. However, in many cases the deadline for filing claims was not established upon commencement of the proceedings, but at a later stage. Therefore, it was proposed that, instead of requiring notification of commencement of the proceedings, paragraph (1) should require notification of foreign creditors whenever the law of the enacting State required notification to be given to all creditors.

160. As regards the foreign creditors that had to be given notification pursuant to paragraph (1), the Working Group considered whether such notification was to be given to known creditors "not resident, domiciled or with a registered office" in the enacting State, as currently provided in paragraph (1), or to known creditors "without an address" in the enacting State. In favour of retaining the wording of paragraph (1) it was stated that the word "address" was not a legal concept and could encompass even a seasonal or transitory location. The notions of "residence", "domicile" or "registered office", in turn, were known to a number of legal systems, which would facilitate the application of paragraph (1) by the court of the enacting State. The prevailing view, however, was that the current formulation of paragraph (1) was excessively rigid and would expose the court of the enacting State to arguments as to whether foreign creditors had their "residences", "domiciles" or "registered offices" at the addresses identified by the court. Therefore, it was held preferable to refer in paragraph (1) to known creditors "without an address in this State".

Paragraph (2)

161. It was pointed out that debtors' records were often incomplete or deficient and that, in practice, it was often difficult to establish, solely on the basis of the documenta-
tion in the insolvency proceeding, a complete list of creditors. Thus, in some jurisdictions attempts were made, through advertisement or other publication procedures, to reach also other creditors not yet known to the court or the insolvency administrator. Since paragraph (1) only referred to notifications to known creditors without an address in the enacting State, it was suggested that paragraph (2) should contain language that contemplated attempts to reach also unknown creditors, through the form of notification deemed appropriate by the court, when the cost of such attempts did not unreasonably burden the proceedings.

Paragraph (3)

162. As a result of the changes that had been approved to paragraph (1), it was proposed to amend paragraph (3) so as to clarify that the information referred to therein was required only for the initial notification issued to foreign creditors.

163. It was noted that, in some legal systems, a secured creditor who filed a claim in an insolvency proceeding might be deemed to have waived the security or some of the privileges attached to the credit. Thus, it was suggested that paragraph (3)(b) should require information to be provided as to whether a secured creditor jeopardized its security by filing the claim. In response it was said that it would be sufficient for the guide to enactment to refer to that possibility, indicating that enacting States where such situations might arise might wish to include information as to the effects of filing claims by secured creditors in the notification to be given pursuant to paragraph (3).

164. A suggestion was made to expand the information required to be contained in the notification, so as to include information on the total value of the debts and assets of the debtor. That proposal did not attract sufficient support, since it was considered that such information might not always be available at the time of commencement of the proceeding. However, nothing in the draft Model Provisions prevented the court of the enacting State from providing such information, where it was available.

Chapter III. Recognition of a foreign proceeding and relief

Article 13. Recognition of a foreign proceeding for the purpose of obtaining relief

165. The text of the article, as considered by the Working Group, read as follows:

“(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative’s appointment.

“(2) An application for recognition shall be accompanied by:

“(a) the duly authenticated decision [or decisions] opening the foreign proceeding and appointing the foreign representative; or

“(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

“(c) in the absence of proof referred to in subparagraphs (a) and (b), any other proof acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

“(3) Subject to article 14, the foreign proceeding shall be recognized

“(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor’s main interests; or

“(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(g) in the foreign State.

“(4) Absent proof to the contrary, the registered seat of the debtor is deemed to be the centre of its main interests.

“(5) If the decision or certificate referred to in paragraph (2) indicates that the foreign proceeding is a proceeding as defined in article 2(a) and that the foreign representative has been appointed within the meaning of article 2(e), the court is entitled to so presume.

“(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

“(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

“(8) An application for recognition of a foreign proceeding shall be decided upon expeditiously)."

General remarks

166. It was agreed to change the title of article 13 to read “Recognition of a foreign proceeding and of a foreign representative”. It was also agreed that, at least in the English text, the word “proof” should be replaced by the word “evidence”.

167. It was suggested to extend the right to apply for recognition of a foreign proceeding to creditors in the enacting State, since they might have an interest in establishing a channel of cooperation between the court of the enacting State and the court of the foreign main proceeding, rather than simply filing their claims abroad, particularly in cases where the assets of the debtor in the enacting State were not sufficient for the payment of local claims. In response it was noted that the recognition of the foreign proceeding was not an adequate solution for such a situation, since the recognition was not conceived as a mechanism for securing cooperation and access by the local creditors to the foreign proceeding, a matter which was dealt with by articles 11 and 21.
Paragraph (2)

168. It was suggested that the foreign representative should be required to submit evidence that enabled the court to establish whether the proceeding for which recognition was sought was a main proceeding or a non-main proceeding. The counterpointing view, however, was that such a provision was not needed, since it would be in the foreign representative’s own interest to supply the court with all the necessary evidence in order to expedite the recognition procedures. In any event, if the Working Group decided to adopt the proposal, it would be necessary to consider what would be the appropriate place to insert it, since paragraph (2) contained alternative provisions. Also, the Working Group would need to consider what form of evidence should be required for that purpose. For lack of time, the Working Group did not reach a conclusion on that matter.

169. It was agreed that the guide to enactment should explain that the words “duly authenticated”, if retained, in paragraph (2)(a) did not mean that the foreign decision was subject to legalization procedures of the type referred to in paragraph (6).

Paragraph (4)

170. For purposes of consistency with the wording used in the European Union Convention on Insolvency Proceedings, it was suggested to use the expression “registered office” rather than “registered seat”. Also, with a view to clarifying that paragraph (4) also covered insolvencies of individuals, it was proposed to redraft paragraph (4) to provide that, absent proof to the contrary, the registered office was deemed to be the centre of the main interests of a legal entity, and the habitual residence was deemed to be the centre of the main interests of an individual.

Paragraph (5)

171. Questions were raised as to the need for paragraph (5), since that provision was not intended to be binding upon the recognizing court. In reply it was noted that in some jurisdictions it was useful to expressly enable the court to make decisions based on the presumptions established by paragraph (5), so as to avoid litigation or obviate the need for lengthy arguments as to the nature of the foreign proceeding and the appointment of the foreign representative.

Paragraph (6)

172. The paragraph received strong support. However, a view was expressed that it would go too far if even in exceptional circumstances no legalization would be required.

Paragraph (8)

173. It was agreed to delete the square brackets around paragraph (8) and to replace the word “expeditiously” by the words “at the earliest possible time”.

Article 14. Grounds for refusing recognition

174. The text of the article, as considered by the Working Group, read as follows:

“Recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

“(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(e); or

“(b) the debtor is a [insert the designations of specially regulated financial services institutions], if the debtor’s insolvency in this State is subject to special regulation in [insert names of laws of the enacting State relating to insolvency of such institutions].”

175. It was widely considered that the word “only” in the chapeau of the article was inappropriate since other grounds for refusal of recognition were to be included in the Model Provisions or were already mentioned in the Model Provisions (article 6 on public policy). The view was expressed that the word “only” should be retained and any grounds for refusal or recognition should be listed or referenced in article 14.

176. Various proposals were made for inclusion of other grounds for refusal of recognition. Those grounds were: the existence of a (main) proceeding in the enacting State or prior recognition in the enacting State of a foreign main proceeding that had been opened in a third State; insufficiency of evidence submitted in support of the request for recognition, or non-compliance with other requirements set out in article 13; the fact that the foreign non-main proceeding had been commenced in a State where the debtor had assets but no establishment as defined in article 2(g); the foreign proceeding was one concerning a consumer as opposed to a commercial person or entity; and the need to protect the interests of creditors in the enacting State. Opposition was expressed with regard to including openended general grounds since article 6 on public policy already offered a sufficiently broad scope for refusal of recognition.

177. A view was expressed that, as an alternative to the enumeration of the grounds on which recognition might be refused, the Model Provisions could contain a definition of the effects limited to coordination and cooperation, to be granted to the recognized foreign proceeding when a local proceeding is already pending in the enacting State. Strong objections were raised against that view.

178. It was observed that, if the existence of a proceeding in the enacting State was to be included as a reason for refusing recognition of a foreign proceeding, that would be in conflict with article 10, which allowed the foreign representative to participate in the proceeding in the enacting State only upon recognition of a foreign proceeding. It was understood that the provisions of article 14 would be drafted in harmony with the provisions of article 10.

179. It was noted that subparagraph (b) provided that recognition could be refused where the debtor was a financial services institution such as a bank if the particular
insolvency was subject to special regulation in the enacting State. It was, however, suggested that cross-border aspects of insolvencies of such institutions should be excluded from the ambit of the Model Provisions altogether. One reason was that cross-border insolvencies of banks raised particular problems that were currently not dealt with, or were not dealt with adequately, in the Model Provisions. Furthermore, those problems were currently studied in other forums and it was suggested that it was therefore premature to include them in the ambit of the Model Provisions prior to a conclusion being reached in those other forums. It was also suggested that cross-border insolvencies of insurance companies gave rise to special regulatory concerns and that therefore those insolvencies too should not be governed by the Model Provisions. The Working Group agreed with those suggestions.

Chapter V. Concurrent proceedings

Article 22. Concurrent proceedings

180. The text of the article, as considered by the Working Group, read as follows:

"(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to open a proceeding in this State against the debtor under [insert names of laws of the enacting State relating to insolvency] only if the debtor has [an establishment] [or assets] in this State[, and the effects of those proceedings shall be restricted to the [establishment] [or [assets] of the debtor situated in the territory of this State]."

"(2) Recognition of a foreign insolvency proceeding is, for the purposes of opening proceedings in this State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent."

Paragraph (1)

181. There was general agreement in the Working Group that, in the situation dealt with in paragraph (1), the court of the enacting State should be able to open an insolvency proceeding not only when the debtor had an establishment in the enacting State but also when it had assets in that State. That solution was considered realistic in view of the fact that a number of States currently allowed the opening of such insolvency proceedings based on the presence of assets in the State. The solution was supported also on the ground that the foreign representative who believed that opening of a local insolvency proceeding was in the best interest of creditors should not face jurisdictional obstacles when requesting the opening of such a proceeding.

182. After the Working Group adopted that solution, it was suggested that, if the presence of assets in the enacting State was sufficient for opening local insolvency proceedings, paragraph (1) could be deleted. That suggestion was opposed on the ground that the provision was still useful as an indication that grounds for jurisdiction other than the presence of assets were not sufficient, and because the paragraph also provided a solution as to the effects of a proceeding opened in the enacting State after recognition of a foreign main proceeding.

183. Support was expressed for the solution in paragraph (1), according to which, after recognition of a foreign main proceeding, the effect of the proceeding opened in the enacting State was to be restricted to the territory of the enacting State.

Paragraph (2)

184. The Working Group approved the substance of paragraph (2).

B. Consideration of principles underlying possible new provisions on concurrent proceedings

185. It was noted that chapter V, "Concurrent proceedings" (arts. 21 and 22), did not deal with a number of issues relating to a situation where, in addition to a foreign insolvency proceeding, an insolvency proceeding had been or might be opened in the enacting State. The Working Group engaged in a discussion of principles that should be taken into account in the formulation of provisions on concurrent proceedings.

Principle 1

186. The Working Group discussed the following principle:

"1. There can only be one main proceeding. The court shall decide which proceeding is the main proceeding."

187. While there was agreement on the principle, it was observed that the objective of the principle might not always be achieved, in particular where both the foreign court and the court in the enacting State decided that the proceedings opened in their respective States were main proceedings. It was considered that in such a case the court of the enacting State should treat the foreign proceeding as a non-main proceeding and would cooperate with the foreign court accordingly.

Principle 2

188. The Working Group discussed the following principle:

"2. The recognition of a foreign proceeding shall not restrict the right to commence a local proceeding."

189. It was noted that article 22 covered that principle.

Principle 3

190. The Working Group discussed the following principle:

"3. A local proceeding shall prevail over the effects of recognition of a foreign proceeding and over relief granted to a foreign representative."

191. Support was expressed for the principle. It was said that, once a local proceeding was opened, the effects of the
recognized foreign proceeding should be reassessed and should be adjusted or terminated in such a way that they did not disturb the administration of the debtor's assets in the enacting State. It was stressed that the provision relating to such adjustment or termination should be flexible enough so as to make it possible to take into consideration factors such as fairness, the need to coordinate concurrent proceedings, acquired rights, the disturbance caused by preventing approved actions from being carried out and the general principle of leaving in place measures that did not disturb the proceeding in the enacting State. A related proposal was to specify in the Model Provisions which relief granted for the benefit of the foreign proceeding (or which effect of recognition of the foreign proceeding) should or could be displaced as a result of the opening of the local proceeding. However, it was also observed that the adoption of the principle without due regard to whether the local proceeding was a main or non-main proceeding would conflict with a long-standing approach of particularly common-law countries to that issue.

Principle 4

192. The Working Group discussed the following principle:

"4. When there are two or more proceedings, there shall be cooperation and coordination."

193. The Working Group endorsed the principle and noted that it was covered by article 21.

Principle 5

194. The Working Group discussed the following principle:

"5. Coordination may include granting relief to the foreign representative. In granting relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative."

195. The view was expressed that, in order to obtain cooperation under article 21, the foreign representative should apply for recognition of the foreign proceeding. That meant, it was said, that the Model Provisions should distinguish between recognition for the purpose of obtaining cooperation and coordination under article 21 and recognition for the purpose of obtaining relief or effects pursuant to articles 10, 16, 17 and 20. It was further said that cooperation between two concurrent proceedings would be refused when recognition of the foreign proceeding was refused; it was added that the existence of a proceeding in the enacting State should be one ground for refusal of recognition.

196. Wide opposition was expressed against that view. It was stressed that recognition should be required only for obtaining relief or effects pursuant to articles 10, 16, 17 and 20 and that, in particular, no formal recognition was needed to obtain cooperation under article 21. Such a requirement would run counter the current practice, pursuant to which judicial cooperation, when granted, was granted without prior recognition. Views were expressed that it would be undesirable and overly complicated to introduce two types of recognition, one for the purposes of cooperation and one for other purposes.

Principle 6

197. The Working Group discussed the following principle:

"6. Creditors shall be allowed to file claims in any proceeding. Payments to creditors from multiple proceedings shall be equalized."

198. The Working Group endorsed the principle and noted that it was covered by articles 11 and 23.

Principle 7

199. The Working Group discussed the following principle:

"7. If there are surplus proceeds of a local non-main proceeding, they shall be transferred to the main proceeding."

200. The Working Group was in agreement with the principle.

ANNEX

Draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency

(Note: The draft articles contained in this annex were prepared pursuant to the deliberations of the Working Group at the current session. However, for lack of time, these draft articles were not reviewed by the Working Group during the session. The preamble and draft articles 1 to 11 and 15 to 21 were prepared by an informal drafting group, which, pursuant to a decision of the Working Group, met during the session. Draft articles 12 to 14 and 22 were prepared by the Secretariat. Draft article 23 was, for lack of time, not considered at the session.)

PREAMBLE

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
(b) greater legal certainty for trade and investment;
(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
(d) protection and maximization of the value of the debtor's assets; and
e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Chapter I. General provisions

Article 1. Scope of application

(1) This [Law] [Section] applies where:
(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding;
or
(b) assistance is sought in a foreign State in connection with a proceeding in this State under [identify laws of the enacting State relating to insolvency]; or
(c) a foreign proceeding and a proceeding in this State under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or
(d) creditors or other interested parties in a foreign State have an interest in requesting the commencement of or participating in a proceeding in this State under [identify laws of the enacting State relating to insolvency].

(2) This [Law][Section] does not apply where the debtor is a [insert the designations of specially regulated financial services institutions such as banks and insurance companies], if the debtor's insolvency in this State is subject to special regulation.

Article 2. Definitions

For the purposes of this Law:
(a) "foreign proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
(b) "foreign main proceeding" means a proceeding taking place in the State where the debtor has the centre of its main interests;
(c) "foreign non-main proceeding" means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (f) of this article;
(d) "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
(e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
(f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. Competent authority

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts or authority competent to perform those functions in the enacting State].

Article 5. Authorization of [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] to act in a foreign State

A [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding in this State under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

Article 6. Public policy exceptions

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Chapter II. Access of foreign representatives and creditors to courts in this State

Article 7. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

Article 8. Limited Jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 9. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

[Upon recognition,] a foreign representative may apply to commence a proceeding in this State under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding under the law of this State are otherwise met.

Article 10. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative may participate in a proceeding concerning the debtor in this State under [identify laws of the enacting State relating to insolvency].

* A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in this State governing the authority of [insert the designation of the government-appointed person or body].
Article 11. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding in this State under [identify laws of the enacting State relating to insolvency] as creditors in this State.

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of unsecured non-preference claims, while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims].

Article 12. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have an address in this State. [The court may order that appropriate steps be taken with a view to notifying any creditors whose address is not yet known.]

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court.

Chapter III. Recognition of a foreign proceeding and relief

Article 13. Recognition of a foreign proceeding and of a foreign representative

(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative's appointment.

(2) An application for recognition shall be accompanied by:

(a) the duly authenticated decision [or decisions] commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) Subject to article 14, the foreign proceeding shall be recognized:

(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor's main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

(4) Absent proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is deemed to be the centre of the debtor's main interests.

(5) If the decision or certificate referred to in paragraph (2) of this article indicates that the foreign proceeding is a proceeding as defined in article 2(a) and that the foreign representative has been appointed within the meaning of article 2(d), the court is entitled to so presume.

(6) No legalization of documents supplied in support of the application for recognition or other similar formalities is required.

(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

(8) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

Article 14. Grounds for refusing recognition

[Subject to article 6,] recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(d); or

(b) . . . *

Article 15. Relief upon application for recognition of a foreign proceeding

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where necessary to protect the assets of the debtor or the interests of the creditors, grant any relief mentioned in article 17.

(2) [Insert provisions (or refer to provisions in force in the enacting State) relating to notice].

*Subparagraph (b) would be the appropriate location for including any additional ground for refusing to recognize a foreign proceeding that the Commission so decide.
(3) Unless extended under article 17(1)(c), the relief granted under this article terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Article 16. Effects of recognition of a foreign main proceeding

(1) Upon recognition of a foreign main proceeding,

(a) the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities are stayed;

(b) the right to transfer, dispose of or encumber any assets of the debtor are suspended.

(2) The scope of the stay and suspension referred to in paragraph (1) of this article is subject to [refer to any exceptions or limitations that are applicable under laws of the enacting State relating to insolvency].

(3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings, to the extent this is necessary to preserve a claim against the debtor.

(4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under [identify laws of the enacting State relating to insolvency] or the right to file claims in such a proceeding.

(5) This article does not apply if, at the time of application for recognition, a proceeding is pending concerning the debtor under [identify laws of the enacting State relating to insolvency].

Article 17. Relief that may be granted upon recognition of a foreign main proceeding

(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of the debtor or the interests of creditors, the court may, at the request of the foreign representative, grant any appropriate relief including:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 16(1)(a);

(b) suspending the right to transfer, dispose of or encumber any assets of the debtor to the extent they have not been suspended under article 16(1)(b);

(c) extending relief granted under article 15;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration and realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) granting any additional relief that may be available to [insert the title of a person or body administering a liquidation or reorganization under the law of the enacting State] under the laws of this State.

(2) Upon recognition of a foreign main or non-main proceeding, the court may entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

(3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding.

Article 18. Notice of recognition and relief granted upon recognition

Notice of recognition of a foreign proceeding [and of the effects of recognition of a foreign main proceeding under article 16] shall be given in accordance with [the procedural rules governing notice of [the commencement of a proceeding under the insolvency laws of this State]].

Article 19. Protection of creditors and other interested persons

(1) In granting or denying relief under article 15 or 17, and in modifying or terminating relief under this article, the court shall take into account the interests of the creditors and other interested persons, including the debtor [must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected].

(2) The court may subject such relief to conditions it considers appropriate.

(3) Upon request of a person or entity affected by relief granted under article 15 or 17, or by the stay or suspension pursuant to article 16(1), the court may modify or terminate such relief [, taking into account the interests of the creditors and other interested persons, including the debtor].

Article 19 bis. Actions to avoid acts detrimental to creditors

Upon recognition of a foreign proceeding, the foreign representative [has standing] to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available, according to the law of the enacting State, to the local insolvency administrator in the context of insolvency proceedings in the enacting State].

Article 20. Intervention by a foreign representative in actions in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in [individual actions] [proceedings] in which the debtor is a [claimant or defendant] [party].

Article 21. Authorization of cooperation and direct communication with foreign courts and foreign representatives

(1) In matters referred to in article 1, a court referred to in article 4 shall cooperate to the maximum extent possible with foreign courts, either directly or through a [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] or a foreign representative. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

(2) In matters referred to in article 1, a [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] shall, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives.
The [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] is permitted, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, to communicate directly with foreign courts or foreign representatives.

(3) Cooperation may be implemented by any appropriate means, including:

(a) appointment of a person or body to act at the direction of the court;
(b) communication of information by any means deemed appropriate by the court;
(c) coordination of the administration and supervision of the debtor's assets and affairs;
(d) approval or implementation by courts of agreements concerning the coordination of proceedings;
(e) coordination of multiple proceedings regarding the same debtor [coordination of main or non-main foreign proceedings and a proceeding in this State under [identify laws of the enacting State relating to insolvency] in respect of the same debtor;
(f) [the enacting State may wish to list additional forms or examples of cooperation].

Article 22. Concurrent proceedings

(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to commence a proceeding in this State against the debtor under [identify laws of the enacting State relating to insolvency] only if the debtor has assets in this State, and the effects of that proceeding shall be restricted to the assets of the debtor situated in the territory of this State.

(2) Recognition of a foreign insolvency proceeding is, for the purposes of commencing a proceeding in this State referred to in paragraph (1) of this article and in the absence of evidence to the contrary, proof that the debtor is insolvent.

Article 23. Rate of payment of creditors

Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding commenced in another State may not receive a payment for the same claim in a proceeding commenced in this State under [identify laws of the enacting State relating to insolvency] with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding commenced in this State is proportionately less than the payment the creditor has already received.


(A/CN.9/WG.V/48) [Original: English]
INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continues its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), on the development of a legal instrument relating to cross-border insolvency.1 This is the fourth session that the Working Group is devoting to the preparation of that instrument, currently entitled the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency.

2. The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners, including at the UNCITRAL Congress under the theme "Uniform commercial law in the twenty-first century", held in 1992.2 The Commission decided at its twenty-sixth session to pursue those suggestions further.3 Subsequently, in order to assess the desirability and feasibility of work in this area, and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994) involving practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders.4 The Colloquium gave rise to the suggestion that work by the Commission should, at least at the current stage, have the limited but useful goal of facilitating judicial cooperation in insolvency matters, providing court access to foreign insolvency administrators and establishing rules for recognition of foreign insolvency proceedings.

3. Subsequently, an international meeting of judges was held specifically to elicit their views as to work by the Commission in this area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22-23 March 1995)).5 The view of the participating judges and government officials concerned with insolvency was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

4. At its eighteenth session (Vienna, 30 October-10 November 1995), the Working Group considered possible issues to be covered by the instrument,6 at its nineteenth and twentieth sessions (New York, 1-12 April 1996, and Vienna, 7-18 October 1996), the Working Group considered draft articles, until then tentatively in the form of draft model legislative provisions.7 At the twentieth session, the
Working Group decided to continue the work under the assumption that the end-product would be in the form of model legislative provisions, which, however, did not exclude the possibility of undertaking work towards model treaty provisions or a convention in the area of cross-border insolvency if the Commission at a later stage so decides.  5.

This note sets forth the newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency, reflecting the deliberations that have taken place thus far, including those of the informal, open drafting group established by the Working Group to revise draft provisions during the course of the deliberations. To the extent the article numbers in the present document differ from those in the previous draft (A/CN.9/WG.V/WP.46), the previous article numbers are indicated in square brackets.

NEWLY REVISED ARTICLES OF THE DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY

Preamble

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
(b) greater legal certainty for trade and investment;
(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested parties;
(d) protection and maximization of the value of the debtor's assets; and
(e) facilitation of the rescue of financially troubled businesses [, thereby protecting investment and preserving employment].

Prior discussion

A/CN.9/433, paras. 22-28 (Working Group, twentieth session)
A/CN.9/422, paras. 19-23 (Working Group, nineteenth session)

Notes

The words "[Law][Section]" in the chapeau are used to emphasize that the Model Legislative Provisions may be enacted as a statute or may be incorporated into an existing insolvency law, for example, as an additional chapter. The point will be explained in the Guide to Enactment, though the somewhat cumbersome expression "[Law][Section]" is not repeated elsewhere in the text.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "foreign proceeding" means a collective judicial or administrative proceeding, including a proceeding opened on an interim basis, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
(b) "foreign main proceeding" means a proceeding taking place in the State where the debtor has the centre of its main interests;
(c) "foreign non-main proceeding" means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (g) of this article;
(d) (c) "opening of a foreign proceeding" is deemed to have taken place when the order opening the proceeding becomes effective, whether or not [final][subject to appeal];
(e) (b) "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
"court" in reference to a foreign court means a judicial or other authority competent to carry out functions referred to in this Law;

"establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Prior discussion

A/CN.9/433, paras. 33-41, 147 (Working Group, twentieth session)
A/CN.9/422, paras. 34-65 (Working Group, nineteenth session)
A/CN.9/419, paras. 95-117 (Working Group, eighteenth session)

Notes

Subparagraph (d) [(c)]. See A/CN.9/433, para. 39.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Prior discussion

A/CN.9/433, paras. 42-43 (Working Group, twentieth session)
A/CN.9/422, paras. 66-67 (Working Group, nineteenth session)

Notes

It may be noted that, for example, article 13(6), which does away with legalization of documents, or article 21, which allows courts to communicate directly, may be displaced by multilateral or bilateral treaties on legalization of documents or on particular forms of international communication between courts. The Working Group might wish to discuss whether article 3 could be refixed in order to clarify the relationship between the Model Provisions and the treaties and to avoid an unnecessarily broad interpretation of the international instruments referred to in the article.

Article 4. Competent [court][authority]*

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts or authority competent to perform those functions in the enacting State].

A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter 1 the following provision:

Nothing in this Law affects the provisions in force in this State governing the authority of [insert the designation of the government-appointed person or body].

Prior discussion

A/CN.9/433, paras. 44-45 (Working Group, twentieth session)
A/CN.9/422, paras. 68-69 (Working Group, nineteenth session)
A/CN.9/419, para. 69 (Working Group, eighteenth session)

Notes

1. Footnote "a". The option in footnote "a" has been prepared pursuant to the request reflected in document A/CN.9/433, paragraph 184.

2. "[court][authority]". If in the enacting State the functions relating to recognition and cooperation are performed by an authority other than a court, the enacting State would have to replace, where appropriate, the term "court" by the name of the relevant authority. The point will be explained in the Guide to Enactment, though the somewhat cumbersome expression "[court][authority]" is not repeated in the subsequent articles. Currently, the articles referring to a court in the enacting State are: 6, 7, 8, 12, 13, 15, 16, 17, 19, 21, 22.

3. Court functions relating to recognition and cooperation. The Working Group might want to discuss whether, instead of the general formulation "The functions referred to in this Law relating to", there should be specific reference to articles of the Model Provisions. The directly relevant articles would be 13 and 21. However, there might be other functions for which the court referred to in article 4 should be competent (such as permitting realization and distribution of assets (article 16(3)) and some of the functions listed in articles 15 and 17).

Article 5. Authorization of [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] to act in a foreign State

A [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding in this State under [insert names of laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

Prior discussion

A/CN.9/433, paras. 46-49 (Working Group, twentieth session)
A/CN.9/422, paras. 70-74 (Working Group, nineteenth session)
A/CN.9/419, paras. 36-39 (Working Group, eighteenth session)

Article 6 [13]. Public policy exceptions

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be [manifestly] contrary to the public policy of this State.

Prior discussion

A/CN.9/433, paras. 156-160 (Working Group, twentieth session)
Notes

Current draft article 6, which in the previous draft appeared in chapter III (Recognition of a foreign proceeding) as article 13 (A/CN.9/WG.V/WP.46), has been moved to chapter I, in line with the decision of the Working Group that the provision on public policy should apply to the entirety of the Model Provisions (A/CN.9/433, para. 158).

Chapter II. Access of foreign representatives and creditors to courts in this State

Article 7 [6]. Access of foreign representatives to courts in this State

A foreign representative is entitled to apply directly to a competent court in this State for the purpose of obtaining any relief available under this Law.

Prior discussion

A/CN.9/433, paras. 50-58 (Working Group, twentieth session)
A/CN.9/422, paras. 144-151 (Working Group, nineteenth session)
A/CN.9/419, paras. 77-79; 172-173 (Working Group, eighteenth session)

Notes

1. Draft article 6 as considered by the Working Group at its twentieth session (A/CN.9/433, para. 50) has been split (pursuant to the decision of the Working Group, A/CN.9/433, para. 51) into current draft article 7, current draft article 9 and current draft article 20.

2. The Working Group might wish to consider whether article 7 should be tied to article 4; if so, the article might be redrafted along the following lines: “A foreign representative is entitled to apply directly to the court referred to in article 4 to obtain recognition of a foreign proceeding or to any competent court in this State to obtain [other] relief available under this Law.”

Article 8 [8]. Limited jurisdiction

The sole fact that a request pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the request.

Prior discussion

A/CN.9/433, paras. 68-70 (Working Group, twentieth session)
A/CN.9/422, paras. 160-166 (Working Group, nineteenth session)

Article 9 [9]. Request by a foreign representative for opening of a proceeding under [insert names of laws of the enacting State relating to insolvency]

A foreign representative is entitled to request the opening of proceedings in this State under [insert names of laws of the enacting State relating to insolvency] if the conditions for opening such proceedings under the law of this State are met.

Prior discussion

A/CN.9/433, paras. 71-75 (Working Group, twentieth session)
A/CN.9/422, paras. 170-177 (Working Group, nineteenth session)

Notes

The Working Group might wish to consider whether the foreign representative’s right to request the opening of an insolvency proceeding in “this State” should depend on recognition of the foreign proceeding.

Article 10 [6(c)]. Participation of a foreign representative in a proceeding under [insert names of laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding concerning the debtor in this State under [insert names of laws of the enacting State relating to insolvency].

Prior discussion

A/CN.9/433, para. 58 (Working Group, twentieth session)
A/CN.9/422, paras. 114-115, 147, 149 (Working Group, nineteenth session)

Notes

The expression “participate” in article 10 is intended to include rights such as the right to be heard in an insolvency proceeding and to make proposals therein.

Article 11 [10]. Access of foreign creditors to a proceeding under [insert names of laws of the enacting State relating to insolvency]

(1) Subject to paragraph (2), foreign creditors have the same rights regarding the opening of, and participation in, a proceeding in this State under [insert names of laws of the enacting State relating to insolvency] as creditors that are citizens of this State or are resident, domiciled or have a registered office in this State.

(2) The provision in paragraph (1) of this article does not affect the ranking of claims in a proceeding under [insert names of laws of the enacting State relating to insolvency],
except that the claims of foreign creditors shall not be ranked lower than general (non-priority or non-preference) claims.\(^b\)

"The enacting State may wish to consider the following alternative wording to replace article 13(2):

(2) The provision in paragraph (1) of this article does not affect the ranking of claims in a proceeding under [insert names of laws of the enacting State relating to insolvency] and the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than general (non-priority or non-preference) claims.

Prior discussion

A/CN.9/433, paras. 77-85 (Working Group, twentieth session)
A/CN.9/422, paras. 179-187 (Working Group, nineteenth session)

Notes

Footnote "b". The alternative provision in footnote "b" relating to foreign tax and social security claims has been prepared pursuant to the considerations in the Working Group reflected in A/CN.9/433, paras. 82-83.

Article 12 [10]. Notification to foreign creditors of a proceeding under [insert names of laws of the enacting State relating to insolvency]

(1) Whenever a notification of commencement of proceedings under [insert names of laws of the enacting State relating to insolvency] is required under the law of this State for creditors in this State, such notification shall be made to known creditors not resident, domiciled or with a registered office in this State.

(2) Notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

(3) The notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court.

Prior discussion

A/CN.9/433, paras. 86-98 (Working Group, twentieth session)
A/CN.9/422, paras. 188-191 (Working Group, nineteenth session)

A/CN.9/419, paras. 84-87 (Working Group, eighteenth session)

Notes

1. Paragraph (1). Paragraph (1) has been inspired by article 40(1) of the European Union Convention on Insolvency Proceedings. However, it may be considered that, while in the context of the limited membership of that Convention reference to the debtor's habitual residence, domicile and registered office is needed, such reference in the Model Provisions, which are to apply universally, is less necessary. Therefore, the Working Group might wish to consider replacing the words "known creditors not resident, domiciled or with a registered office in this State" by words such as "known creditors without an address in this State". The suggested wording would have the added benefit of being in harmony with the solutions, found in a number of national laws, which require the foreign creditor who has received notice of an insolvency proceeding to name an address or agent in the State of the proceeding for receiving subsequent notices. Furthermore, the change would avoid using the expressions "resident" and "domiciled", which may be regarded as synonymous.

2. Paragraph (3)(b). It is suggested to align the expressions "secured creditors" and "secured claims" in subparagraph (b) with the corresponding expressions in square brackets in article 23.

Chapter III. Recognition of a foreign proceeding and relief

Article 13 [7, 11]. Recognition of a foreign proceeding for the purpose of obtaining relief

(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative's appointment.

(2) An application for recognition shall be accompanied by:

(a) the duly authenticated decision [or decisions] opening the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of proof referred to in subparagraphs (a) and (b), any other proof acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) Subject to article 14, the foreign proceeding shall be recognized

(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor's main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(g) in the foreign State.
(4) Absent proof to the contrary, the registered seat of the debtor is deemed to be the centre of its main interests.

(5) If the decision or certificate referred to in paragraph (2) indicates that the foreign proceeding is a proceeding as defined in article 2(a) and that the foreign representative has been appointed within the meaning of article 2(e), the court is entitled to so presume.

(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

[(8) An application for recognition of a foreign proceeding shall be decided upon expeditiously].

Prior discussion

A/CN.9/433, paras. 59-67, 99-104 (Working Group, twentieth session)
A/CN.9/422, paras. 76-93, 152-159 (Working Group, nineteenth session)
A/CN.9/419, paras. 62-69, 178-189 (Working Group, eighteenth session)

Notes

1. Paragraph (1). It may be considered whether paragraph (1) should refer to the court specified in article 4 (see also A/CN.9/433, para. 57).

2. Paragraph (3). The Working Group may wish to consider reformulating paragraph (3)(a) along the following lines: "(a) as a foreign main proceeding if the debtor has in the foreign State the centre of its main interests" so as to align it with paragraph (3)(b).

3. Paragraph (3)(b). The Working Group might wish to discuss whether an uncertainty may ensue from an understanding that, strictly speaking, the debtor can be considered as having an establishment in the "centre of its main interests". If so, the Working Group might wish to consider replacing the words "the debtor has an establishment" in paragraph (3)(b) by a formulation such as "the debtor has merely an establishment" or to reformulate the subparagraph along the following lines "(b) as a foreign non-main proceeding if the debtor does not have in the foreign jurisdiction the centre of its main interests but an establishment within the meaning of article 2(g)".

4. Paragraph (4). It might be considered whether the substance of paragraph (4) should be moved to the end of the definition of "foreign main proceeding" in article 2(b).


6. Possible new provision. The Working Group may wish to consider the need to establish in the Model Provisions a duty of the foreign representative to inform the court of the status of the debtor (or his or her appointment) or of the status of the foreign proceeding (in particular of its termination or its transformation from a liquidation proceeding into a reorganization proceeding). Giving such information to the court may be important in all circumstances (A/CN.9/419, para. 170), but seems particularly important when the foreign proceeding has been opened on an interim basis or the foreign representative has been appointed provisionally (A/CN.9/433, para. 113). One possible approach to providing such a duty might be to introduce a new subparagraph in article 13(2) along the following lines: "(d) an undertaking to inform the court of any change in the status of the foreign proceeding or of his or her appointment". Another approach, somewhat different in substance from the one just mentioned, might be to include a new paragraph in article 11 along the following lines: "(5 bis) The court [may][shall] require the foreign representative to undertake to inform the court of any change in the status of the foreign proceeding or of his or her appointment".

Article 14. Grounds for refusing recognition

Recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(e); or

(b) the debtor is a foreign main proceeding if the debtor has an establishment in the "centre of its main interests". Another possible approach, somewhat different in substance from the one just mentioned, might be to include a new paragraph in article 11 along the following lines: "(5 bis) The court [may][shall] require the foreign representative to undertake to inform the court of any change in the status of the foreign proceeding or of his or her appointment".

Notes


2. Possible new subparagraph (c). For a possible exclusion of consumer insolvencies from the Model Provisions, see A/CN.9/433, paras. 35-37 (see also A/CN.9/422, para. 41, and A/CN.9/419, para. 33). If the exclusion of consumer insolventcies should be addressed in the Model Provisions, the Working Group might wish to discuss whether this should be done by a footnote to the article (e.g. "The enacting State might wish to consider adding the following subparagraph to article 14: (c) the debtor's debts were incurred predominantly for personal, family or household purposes") or by a new subparagraph in the article itself.

3. Possible new subparagraph (d). The Working Group might wish to consider whether, in light of draft article 13(3), article 14 should contain a provision to the effect that recognition may also be refused where the foreign court lacked jurisdiction to open the foreign proceeding.

4. Reference to article 6. In order to avoid an apparent inconsistency between article 6 and the expression "may only be refused where" in the chapeau of article 14, it might be considered including, at the beginning of article 14, words such as "Subject to article 6".

Part Two. Studies and reports on specific subjects
Article 15 [12(1)]. Relief upon application for recognition of a foreign proceeding

(1) From the time of filing an application for recognition until the application is decided upon, the court may, under the conditions in article 17, grant any relief permitted under that article.

(2) The court shall order the foreign representative to give such notice as would be required for requests for provisional relief in this State.

(3) Such relief may not extend beyond the date that the application for recognition is decided upon, unless it is extended under article 17(1)(c).

Prior discussion

A/CN.9/433, paras. 110-114 (Working Group, twentieth session)
A/CN.9/422, paras. 116, 119, 122-123 (Working Group, nineteenth session)
A/CN.9/419, paras. 174-177 (Working Group, eighteenth session)

Notes

1. The Working Group may wish to replace the word “permitted” in paragraph (1) by “available”, the expression used elsewhere in the text in similar contexts.

2. Paragraph (2). See note 1 to article 18.

3. Paragraph (3). The Working Group may wish to consider whether, in light of its decision taken at its twentieth session to delete the then draft article 12(d)(i) (see A/CN.9/433, paras. 108 and 136), it wishes to delete also current paragraph (3). (See also article 17(1)(c).)

Article 16 [12(2)(a), (3)]. Relief upon recognition of a foreign main proceeding

(1) Upon recognition of a foreign main proceeding,

(a) the commencement or continuation of individual actions or proceedings concerning the debtor’s assets, rights, obligations or liabilities shall be stayed; and

(b) the right to transfer, dispose with or encumber any assets of the debtor shall be suspended.

(2) The scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under [insert names of laws of the enacting State relating to insolvency].

(3) No earlier than _ days after recognition of a foreign main proceeding, the court may permit the foreign representative to administer, realize and distribute assets of the debtor in the foreign proceeding. If a proceeding concerning the debtor under [insert names of laws of the enacting State relating to insolvency] has been opened, such permission may only be given after the completion of that proceeding.

Prior discussion

NCN.9/419, paras. 148-152 (Working Group, eighteenth session)
NCN.9/422, paras. 112 (Working Group, nineteenth session)
NCN.9/433, paras. 108 and 136 (Working Group, twentieth session)
NCN.9/419, para. 174 (Working Group, eighteenth session)
NCN.9/433, paras. 115-119 (Working Group, eighteenth session)

Prior discussion of paragraphs (1) and (2)

A/CN.9/433, paras. 115-126 (Working Group, twentieth session)
A/CN.9/422, paras. 94-110 (Working Group, nineteenth session)
A/CN.9/419, paras. 137-143 (Working Group, eighteenth session)

Notes

1. Paragraph (3). It may be noted that article 4, as currently drafted, does not expressly cover the court competence for giving a permission envisaged in article 16(3). The Working Group might wish to consider whether the court mentioned in article 16(3) should be the court referred to in article 4 and whether this should be made clear in the text. (See also note 3 to article 4).

2. Paragraph (3) ("administer"). The Working Group may wish to discuss the relationship between the concept of "administer" in article 16(3) and the concept of "manage" in article 17(1)(c). (See A/CN.9/433, paras. 129, 138-139).

3. Footnote "c" to paragraph (1). Since footnote "c", as drafted, is limited to foreign main proceedings, it might be considered that a bare application for recognition might not suffice to produce the "stay" and "suspension" as provided in subparagraphs (a) and (b). Namely, at the time of application it might not yet be certain whether the foreign proceeding is a main proceeding. The application would at least have to allege or present some proof that the foreign proceeding is a main proceeding, or the court seized with the application would otherwise have to have reasonable assurance that the application concerns a main proceeding.

The Working Group might wish to consider whether the current wording of the footnote is satisfactory or whether additional language should be included to make the point clear.
Article 17 [12(2)(b)]. Relief upon recognition of a foreign main or non-main proceeding

(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of the debtor or the interests of creditors, the court may, upon the request of the foreign representative, grant any appropriate relief including:

(a) staying the commencement or continuation of individual actions or proceedings concerning the debtor’s assets, rights, obligations or liabilities, to the extent they were not stayed under article 16(1)(a);

(b) suspending the transfer, disposal or encumbrance of any assets of the debtor, to the extent they were not suspended under article 16(1)(b);

(c) extending relief granted under article 15;

(d) compelling testimony or the delivery of information concerning the assets and liabilities of the debtor;

(e) entrusting the preservation and management of the assets of the debtor to the foreign representative or another person designated by the court;

(f) granting other relief that may be available under the laws of this State.

(2) The court may refuse to grant relief in respect of a foreign non-main proceeding if such relief would interfere with the administration of a foreign main proceeding.

The enacting State may wish to consider the following alternative wording to replace subparagraph (f):

(f) granting other relief that may be available under the laws of the State or the laws of the State where the foreign proceeding is taking place.

Prior discussion
A/CN.9/433, paras. 127-134 (Working Group, twentieth session)
A/CN.9/422, paras. 111-113 (Working Group, nineteenth session)
A/CN.9/419, paras. 154-166 (Working Group, eighteenth session)

Notes
1. Paragraph (2). For the discussion of other possible approaches to distinguishing between main and non-main proceedings, see A/CN.9/433, paras. 147-155.

2. "Paulian actions". If the Working Group decides to consider the right of the foreign representative to initiate actions to reverse or render unenforceable legal acts detrimental to creditors (sometimes referred to as "Paulian actions"; A/CN.9/433, para. 134), it may wish to do so on the basis of a new draft article along the following lines: "A foreign representative has the right to initiate, under the conditions of the law of this State, an action to reverse or render unenforceable legal acts detrimental to all creditors."

Article 18 [12(2)(c)]. Notice of recognition and relief granted upon recognition

[The foreign representative shall] [When the court recognizes a foreign main or non-main proceeding pursuant to article 13(3), it shall order the foreign representative to] give notice of the recognition, of the stay and suspension as provided in article 16(1), and of any relief granted under article 17(1), within ___ days to all known creditors that have an address in this State. Such notice shall be given in the form required by the law of this State. [The obligation] [The order] to give notice does not suspend the effectiveness of the recognition or the relief.

Prior discussion
A/CN.9/433, para. 135 (Working Group, twentieth session)
A/CN.9/422, para. 122-123 (Working Group, nineteenth session)

Notes
1. The Working Group may wish to consider incorporating the notice provision in current article 15(2) into article 18. If it is so decided, the consolidated article 18 might be worded along the following lines:

"Notice by foreign representative to creditors in this State"

(1) The court shall order the foreign representative to give notice to all known creditors that have an address in this State of

(a) any relief granted under article 15;

(b) the decision to recognize the foreign main or non-main proceeding pursuant to article 13(3) and of the stay and suspension as provided in article 16(1);

(c) any relief granted under article 17(1).

(2) Such notice shall be given within ___ days of the relevant decision in the form required by the law of this State. The order to give notice does not suspend the effectiveness of the recognition or the relief."

2. The Working Group might wish to discuss whether article 18 should expressly leave room for the court to tailor the notice requirement to fit the circumstances of the case (e.g. by expressly allowing the court to prescribe the content of the notice). On the other hand, it might be considered that the point is sufficiently covered by article 19(3).

Article 19 [12(4), (5), (6)]. Protection of creditors and the debtor

(1) In granting or denying relief under [articles 15, 16 or 17] [this Law], the court must be satisfied that creditors collectively and the debtor are protected against undue prejudice and will be given a fair opportunity to assert their claims and defences.

(2) Upon request of a person or entity affected by relief under articles 15, 16 or 17, the [competent] court may [deny] modify or terminate such relief.

(3) The court granting relief to the foreign representative may subject such relief to conditions it considers appropriate.
Prior discussion

A/CN.9/433, paras. 140-146 (Working Group, twentieth session)
A/CN.9/422, para. 113 (Working Group, nineteenth session)

Notes


2. Paragraph (2): "court may deny ... relief". It might be considered that reference to denial of relief in paragraph (2) is unnecessary and should be deleted. As to "stay" and "suspension" dealt with in article 16(1), relief may be denied under articles 16(2) and 6. As to court measures under articles 15 and 17, the possibility to deny relief is implied in the discretion to grant it.

Article 20 [6(c)]. Interventia by a foreign representative in actions in this State

Upon recognition of a foreign proceeding, the foreign representative may intervene in actions in which the debtor is a [party][claimant or defendant] under the conditions of the law of this State.

Prior discussion

A/CN.9/433, paras. 51, 58 (Working Group, twentieth session)
A/CN.9/422, paras. 148-149 (Working Group, nineteenth session)

Notes

It might be considered whether article 20 should be included, as the second paragraph, in article 7.

Chapter IV. Cooperation with foreign courts and foreign representatives

Article 21 [15]. Authorization of cooperation and direct communication with foreign courts and foreign representatives

(1) In matters referred to in article 1, courts of this State shall cooperate to the maximum extent possible with foreign courts and foreign representatives. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

(2) In matters referred to in article 1, a [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] shall, within its authority, cooperate to the maximum extent possible with foreign courts and foreign representatives. The [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] is permitted, within its authority, to communicate directly with foreign courts or foreign representatives.

(3) Cooperation may be implemented by any appropriate means, including:

(a) appointment of a person to act at the direction of the court;
(b) communication of information by any means deemed appropriate by the court;
(c) coordination of the administration and supervision of the debtor's assets and affairs;
(d) approval or implementation by courts of arrangements concerning the coordination of proceedings;
(e) the enacting State may wish to list additional forms or examples of cooperation.

Prior discussion

A/CN.9/433, paras. 164-172 (Working Group, twentieth session)
A/CN.9/422, paras 129-143 (Working Group, nineteenth session)
A/CN.9/419, paras. 75-76, 80-83, 118-133 (Working Group, eighteenth session)

Notes

1. Paragraph (1). If the Working Group wishes to implement the suggestion reported in paragraph 168 of document A/CN.9/433, it might decide to replace the expression "courts of this State" in paragraph (1) by words such as: "a court involved in supervising proceedings under [names of applicable laws of the enacting State relating to insolvency]" or "a court referred to in article 4".

2. Paragraph (2). The Working Group may wish to consider whether alignment of articles 5 and 21(2) would be useful.

Chapter V. Concurrent proceedings

Article 22 [18]. Concurrent proceedings

(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to open a proceeding in this State against the debtor under [insert names of laws of the enacting State relating to insolvency] only if the debtor has [an establishment] [or assets] in this State, and the effects of those proceedings shall be restricted to the [establishment] [or assets] of the debtor situated in the territory of this State.

(2) Recognition of a foreign insolvency proceeding is, for the purposes of opening proceedings in this State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent.

Prior discussion

A/CN.9/433, paras. 173-181 (Working Group, twentieth session)
A/CN.9/422, paras. 192-197 (Working Group, nineteenth session)
Notes

The Working Group may wish to consider whether the title of the article should read: "Jurisdiction to open a concurrent proceeding in this State".

Article 23 [19]. Rate of payment of creditors

Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding opened in another State may not receive a payment for the same claim in a proceeding opened in this State under [...] insert names of laws of the enacting State relating to insolvency] with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding opened in this State is proportionately less than the payment the creditor has already received.

Prior discussion

A/CN.9/433, paras. 182-183 (Working Group, twentieth session)
A/CN.9/422, paras. 198-199 (Working Group, nineteenth session)
A/CN.9/419, paras. 89-93 (Working Group, eighteenth session)

E. Draft Guide to Enactment of the UNCITRAL Model Legislative Provisions on Cross-Border Insolvency: note by the Secretariat

(A/CN.9/436) [Original: English]

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I. PURPOSE OF THIS GUIDE

1. In preparing this Guide to Enactment, the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the UNCITRAL Model Legislative Provisions on Cross-Border Insolvency would be a more effective tool for modernizing international aspects of insolvency law if background and explanatory information were provided to executive branches of Governments and legislators using the Model Provisions in preparing the necessary legislative revisions. Such information might assist States also in considering which, if any, of the provisions should be varied in order to be adapted to the particular national circumstances.

2. The present Guide to Enactment was adopted by the Commission [...].

II. BACKGROUND AND PURPOSE OF MODEL PROVISIONS

3. The Model Provisions were adopted to assist States (herein referred to as "enacting States") to formulate a modern, harmonized and fair legislative framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where among the creditors of the debtor there are some that are not from the State where the insolvency proceeding is taking place.
4. The Model Provisions offer an opportunity for States to adopt certain modern, internationally-accepted practices into their law. The Model Provisions represent a universal consensus on certain practices in insolvency matters that are characteristic of modern, efficient insolvency systems, and therefore offer an opportunity for introducing some useful additions and improvements as well as uniformity into the insolvency regimes of the enacting States. Jurisdictions that will find the Model Provisions useful include those that have had to deal with numerous cases of cross-border insolvency as well as those that wish to be well prepared for them.

5. The Model Provisions respect the differences among national procedural laws and do not attempt a substantive unification of insolvency law. They offer solutions that help in several modest, but nonetheless significant ways; those include:

(a) Providing access for the person administering a foreign insolvency proceeding ("foreign representative") to the courts of the enacting State, thereby permitting the foreign representative to petition the courts of the enacting State for a temporary "breathing space", to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

(b) Determining when a foreign insolvency proceeding should be accorded "recognition", and what the consequences of recognition may be;

(c) Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

(d) Permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

(e) Authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;

(f) Providing for court jurisdiction and facilitating coordination in cases of concurrent insolvency proceedings.

6. The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. National insolvency laws have by and large not kept pace with the trend, in that they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the insolvent debtor's assets against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cases of cross-border insolvency impedes capital flows and is a disincentive to cross-border investment.

7. Only a limited number of countries have a legislative framework for dealing with cross-border insolvency that is well suited to the needs of international trade. Various techniques and notions are employed in the absence of a specific legislative or treaty framework for dealing with cross-border insolvency. Those 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; and enforcement of foreign insolvency orders relying on legislation on enforcement of foreign judgments as well as through techniques, such as letters rogatory.

8. Approaches based purely on the doctrine of comity or the exequatur do not provide the same degree of predictability and reliability as would a specific legislative framework for judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. For example, general legislation on reciprocal recognition of judgments, including exequatur, might be confined in a given legal system to enforcement of specific money judgments or injunctive orders in two-party disputes, rather than collective insolvency proceedings. Furthermore, recognition of foreign insolvency proceedings might not be considered as a matter of recognizing a "judgment". Recognition might be withheld, for example, if the foreign bankruptcy order is considered to be merely a declaration of status or if it is considered not to be final.

9. To the extent there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it is more likely that assets would be concealed or dissipated, and possibly liquidated without reference to other possible, more advantageous, solutions. As a result, not only is the ability of creditors to receive payment diminished, but so also is the possibility of rescuing financially-viable businesses and of saving jobs. By contrast, the presence in national legislation of mechanisms for a coordinated administration of cases of cross-border insolvency makes it possible to adopt solutions that are sensible from the point of view of the legitimate interests of the creditors and the debtor; such mechanisms are therefore perceived as advantageous for foreign investment and trade.

10. The Model Provisions take into account other international efforts. Those include the European Union Convention on Insolvency Proceedings, the European Convention on Certain International Aspects of Bankruptcy of 1990 (the Istanbul Convention), the Montevideo private international law treaties of 1889 and 1940, the Convention regarding bankruptcy between Nordic States of 1933 as well as the Havana Convention of 1928 (the Bustamante Code). Proposals from non-governmental organizations include the Model International Insolvency Cooperation Act (MIICA) as well as the Cross-Border Insolvency Concordat, both developed by Commitee J (Insolvency) of the Section on Business Law of the International Bar Association (IBA).

III. MAIN FEATURES OF MODEL PROVISIONS

A. Model Provisions fitting into existing national law

11. With a scope limited to procedures for dealing with some aspects of cross-border cases, the Model Provisions are intended to operate as an integral part of existing national insolvency statutes. This is manifested in several ways:
(a) The amount of possibly new terminology added to existing law by the Model Provisions is limited (e.g. terms specific to the context, such as "foreign proceedings" and "foreign representative"). The terms used are such that they are unlikely to be in conflict with terminology in existing law;

(b) The Model Provisions present to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law;

(c) Recognition of foreign proceedings does not prevent local creditors from initiating collective insolvency proceedings in the enacting State (article 22);

(d) Relief available to the foreign representative is subject to the protection of local creditors and other interested persons, including the debtor, against undue prejudice, as well as to compliance with the procedural requirements of the enacting State and to applicable notification requirements (article 19);

(e) The Model Provisions retain the possibility of excluding or limiting the effects of recognition on the basis of overriding public policy considerations (article 6);

(f) The Model Provisions are in the form of model legislation and possess the flexibility suited for taking into account differing approaches in national insolvency laws and varied propensities of States to cooperate in insolvency matters and to coordinate insolvency proceedings (article 21).

12. Despite the useful flexibility with which the Model Provisions may be incorporated in the national law, it is useful to bear in mind the desirability of their uniform interpretation, which makes it advisable to limit deviations from the uniform text to the minimum. One advantage of uniformity is that it will make it easier for the enacting States to obtain cooperation from other States in insolvency matters. Thus, the flexibility to adapt the Model Provisions to the legal system of the enacting State should be utilized with due consideration for the need for uniformity and for the benefits to the enacting State in adopting modern, generally acceptable international practices in insolvency matters.

B. Scope of application of Model Provisions

13. The Model Provisions apply in a number of cross-border insolvency situations. Those include: (a) the case of an inward-bound request for recognition of a foreign proceeding; (b) an outward-bound request from a court or another official body in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) requests for coordination of proceedings taking place concurrently in the enacting State and another State; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State (article 1).

C. Types of foreign proceedings covered

14. A foreign insolvency proceeding, in order to fall within the scope of the Model Provisions, needs to possess certain attributes. These include: basis in insolvency-related law of the originating State; collective representation of creditors; and control or supervision of the assets and affairs of the debtor by a court or another official body (article 2(a)).

15. Thus, it is intended that a variety of collective proceedings would be capable of recognition, including compulsory or voluntary, corporate or individual, winding-up or reorganization, as well as those in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments; "debtor in possession").

16. An inclusive approach has been used also as regards the possible types of debtors covered by the Model Provisions. The only exception concerns financial institutions and insurance companies specially regulated under the laws of the enacting State, which are excluded from the scope of application of the Model Provisions (article 1(2)).

D. Foreign assistance for insolvency proceedings taking place in the enacting State

17. In addition to equipping the courts of the enacting State to deal with incoming requests for recognition, the Model Provisions permit the courts of the enacting State to seek assistance abroad on behalf of proceedings taking place in the enacting State.

18. Addition of the authorization for the courts of the enacting State to seek cooperation abroad may help to fill a gap in legislation in some States. Without such legislative authorization, the courts may, in some legal systems, feel constrained from seeking such assistance abroad. This creates potential obstacles to a coordinated international response in case of cross-border insolvency.

19. The Model Provisions may similarly help an enacting State fill gaps in its legislation as to the "outward" powers of persons appointed to administer insolvency proceedings under the local insolvency law. Article 5 authorizes those persons to act abroad for the purpose of seeking recognition of, and assistance for, those proceedings.

E. Foreign representative’s access to courts of the enacting State

20. An important objective of the Model Provisions is to provide for expedited procedures for giving access to foreign representatives to the courts of the enacting State. Such access provides the opportunity for fast action to be taken in the event of a cross-border insolvency. It avoids the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications which might otherwise have to be used. This helps to increase the likelihood of a coordinated, cooperative approach to the case of cross-border insolvency.

21. In addition to establishing the principle of direct court access for the foreign representative, the Model Provisions:
(a) Establish simplified proof requirements for seeking recognition and relief for foreign proceedings, avoiding time-consuming “legalization” requirements involving notarial or consular procedures (article 13);

(b) Provide that the foreign representative is entitled to commence an insolvency proceeding in the enacting State (if the conditions therefor are otherwise met) and that the foreign representative may participate in an insolvency proceeding in the enacting State (articles 9 and 10);

(c) Confirm, subject to other requirements of the enacting State, access of foreign creditors to the courts of the enacting State for the purpose of opening in the enacting State an insolvency proceeding or participating in such a proceeding (article 11).

(d) Give the foreign representative the right to intervene in individual actions in the enacting State affecting the debtor or its assets (article 20);

(e) Provide that the mere fact of a petition for recognition in the enacting State does not mean that the courts in that State have jurisdiction over the debtor’s entire assets and affairs (article 8).

F. Recognition of foreign proceedings

(a) Determination of whether to recognize a foreign proceeding

22. The Model Provisions establish a test for deciding whether to grant recognition of a foreign proceeding (articles 13 and 14) and provide that, in appropriate cases, the court may grant interim relief pending a decision on recognition (article 15). The test involves an assessment of the basis of the jurisdiction of the court from which the foreign proceeding emanates, and includes a determination of whether the jurisdictional link on the basis of which the foreign proceeding was opened was such that it should be considered as a “main” or “non-main” foreign insolvency proceeding.

23. A foreign proceeding is deemed to be the “main” proceeding if the proceeding has been opened in the State where “the debtor has the centre of its main interests”. That formulation corresponds to the one found in the European Union Convention on Insolvency Proceedings (article 3 of that Convention). This allows the Model Provisions to build on the developing harmonization as regards the notion of a “main” proceeding. The determination that a foreign proceeding is “main” may affect the nature of the relief accorded to the foreign representative.

(b) Relief available to a foreign representative

24. A key element of the relief accorded upon recognition of the representative of a foreign “main” proceeding is that of a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the debtor’s assets, and a suspension of the debtor’s right to transfer or encumber its assets (article 16(1)(a) and (b)). Such stay and suspension are “mandatory” in the sense that they either flow automatically from the recognition of a foreign main proceeding or the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide a “breathing space” until appropriate measures are taken for reorganization or fair liquidation of the debtor’s affairs and assets. The suspension of transfers is necessary because in the modern, globalized economic system it is possible for multi-national debtors to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding thus provides a quick “freeze” essential to prevent fraud, protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.

25. Exceptions and limitations to the scope of the stay and suspension are determined by provisions governing comparable stays and suspensions in insolvency proceedings under the laws of the enacting State (e.g. exceptions for secured claims, payments by the debtor made in the ordinary course of business, set-off, execution of rights in rem).

26. In addition to such “mandatory” stay and suspension, the Model Provisions authorize the court to grant “discretionary” relief for the benefit of any proceeding (whether “main” or not) (article 17). Such discretionary relief, to be granted, to the extent the court considers it appropriate, includes, in addition to the stay and suspension, for example, facilitating access to information concerning the debtor’s assets and liabilities, preservation and management of those assets, and any other relief that may be available under the laws of the enacting State.

(c) Protection of local interests

27. In order to provide sufficient opportunity for adequate protection of the interests of the creditors (in particular local creditors), the debtor or other affected persons, it is provided, for example, that, when recognition is accorded to a foreign representative, notice thereof must be given as provided by the insolvency law of the enacting State (article 18); that the court may subject the relief it grants to conditions it considers appropriate (article 19(2)); and that the court may modify or terminate the relief granted, [including the “mandatory” stay or suspension resulting pursuant to article 16,] if so requested by a person affected thereby (article 19(3)).

G. Cross-border cooperation

28. A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvency derives from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, for pursuing cooperation with foreign courts.

29. Experience has shown that, irrespective of the discretion courts may traditionally enjoy in a State, the passage of a specific legislative framework is useful for promoting international cooperation in cross-border cases. Accord-
ingly, the Model Provisions fill the gap found in many national laws by expressly empowering courts to extend cooperation in the areas governed by the Model Provisions (article 21).

30. For similar reasons, provisions are included authorizing cooperation between a court in the enacting State and a foreign representative, and between a person administering the insolvency proceeding in the enacting State and a foreign court or a foreign representative (article 21).

31. To assist end-users of the Model Provisions, space is left for listing additional forms of cooperation. It is advisable to keep the list illustrative rather than exhaustive so as not to stymie the ability of courts to fashion remedies in keeping with specific circumstances.

H. Concurrent proceedings

32. The Model Provisions provide an opportunity for the enacting State to include in its insolvency law a clear statement of the effect that recognition of a foreign proceeding would have on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings. The Model Provisions state that, even after recognition of a foreign “main” proceeding, jurisdiction remains with the courts of the enacting State to institute an insolvency proceeding if the debtor has assets in the enacting State (article 22). If the enacting State would wish to restrict its jurisdiction to cases where the debtor has not only assets but an establishment in the enacting State, the adoption of such a restriction would not be contrary to the policy underlying the Model Provisions.

33. In addition, the Model Provisions deem the recognized foreign proceeding to constitute proof that the debtor is insolvent for the purposes of commencing local proceedings. This rule may be helpful in those legal systems in which commencement of insolvency proceedings requires proof that the debtor is in fact insolvent. Avoidance of repeated proof of financial failure reduces the likelihood that a debtor may delay proceedings long enough to conceal or carry away assets.

34. Another rule designed to enhance coordination of concurrent proceedings is the one on rate of payment of creditors (article 23). It provides that a creditor, by claiming in more than one proceeding, does not receive more than the proportion of payment that is obtained by other creditors of the same class.

IV. ARTICLE-BY-ARTICLE REMARKS

Title

35. The title uses the term “insolvency”. In some jurisdictions the term has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person, or only to collective proceedings against a natural person; in those jurisdictions, another term, such as “bankruptcy” may be used to refer to proceedings other than “insolvency” proceedings. No such distinction is intended to be drawn by the use of the term “insolvency” in the Model Provisions, since these Provisions are designed to be applicable to proceedings regardless of whether they involve a natural or legal person as the debtor.

36. Upon enactment, it may have to be considered whether the title of the Model Provisions, as incorporated into the national insolvency law, should be adapted to the terminology used in the local law. At the same time, it is desirable when referring to foreign proceedings to utilize terminology consistent with the substance of article 2(a) so as to provide for the broadest possible recognition of foreign proceedings. Perhaps it would suffice to entitle the section in the national law enacting the Model Provisions along the lines of “cross-border proceedings” or “foreign proceedings”. This would avoid utilizing terms such as “insolvency” or “bankruptcy”, which may, for the present purposes, have too narrow a technical meaning in some legal systems.

Preamble

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) greater legal certainty for trade and investment;

(c) fair and efficient administration of cross-border insolvencies that protects the interest of all creditors and other interested persons, including the debtor;

(d) protection and maximization of the value of the debtor’s assets; and

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

37. The Preamble gives a succinct statement of the basic policy objectives of the Model Provisions. It is not intended to create substantive rights, but rather to give a general orientation for users of the Model Provisions as well as to assist in the interpretation of the Model Provisions.

38. In States where it is not customary to set out preambular statements of policy in legislation, consideration might be given to including the statement of objectives either in the body of the statute or in a separate document, so as to preserve a useful tool for the interpretation of the law.

Article 1. Scope of application

(1) This [Law] [Section] applies where:

(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) assistance is sought in a foreign State in connection with a proceeding in this State under [identify laws of the enacting State relating to insolvency]; or
42. [Paragraph (2): reasons for excluding financial institutions from the Model Provisions.]

Article 17(1)(j).

are covered by a broader formulation such as the one in
in the Model Provisions. Some of those measures are spe­
making a cross-border request directed to a court or an insol­

(2) This [Law][Section] does not apply where the debtor is a [insert the designations of specially regulated financial services institutions such as banks and insurance companies], if the debtor's insolvency in this State is subject to special regulation.

39. The words "[Law][Section]" are used in article 1 to emphasize that in many instances the Model Provisions would be enacted as an additional "section" in the existing insolvency law. However, throughout the remainder of the Model Provisions only the word "Law" is used.

40. The expression "this State" is used in the preamble and throughout the Model Provisions to refer to the State that is enacting the text. The national statute may use another expression that is customarily used for that purpose.

41. "Assistance" in paragraph (1)(a) and (b) is meant to cover various situations, dealt with in the Model Provisions, in which a court or an insolvency administrator may make a cross-border request directed to a court or an insolvency administrator for a measure to be taken as envisaged in the Model Provisions. Some of those measures are specifically mentioned in the Model Provisions, while others are covered by a broader formulation such as the one in article 17(1)(f).

42. [Paragraph (2): reasons for excluding financial institutions from the Model Provisions.]

Article 2. Definitions

For the purposes of this Law:

(a) "foreign proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "foreign main proceeding" means a proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "foreign non-main proceeding" means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

43. Since the Model Provisions will be embedded in the national insolvency law, article 2 only needs to define the terms specific to cross-border scenarios. Thus, the Model Provisions contain definitions of the terms "foreign proceeding" and "foreign representative"; but not of the person or body that may be entrusted with the administration of the debtor's assets in an insolvency proceeding in the enacting State. To the extent that it would be necessary to define in the national statute the term used for such a person or body, this may be added to the legislation enacting the Model Provisions.

44. The definitions used in the Model Provisions, when they refer to proceedings or persons emanating from foreign jurisdictions, are phrased in "functional" rather than in specific technical terms that may be utilized in one or the other jurisdiction. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition, and to avoid unnecessary conflict with terminology used in the laws of the enacting State (see also paragraph 11, above). As noted above in paragraph 35, the term "insolvency" is an example of a term that may have a technical meaning in some legal systems, but which is intended here (subparagraph (a)) to refer broadly to companies in severe financial distress.

45. The definition of the term "establishment" (subparagraph (f)) has been modelled on article 2(h) of the European Union Convention on Insolvency Proceedings. The use of this term and its definition is advisable so as to contribute to the harmonization of terminology; nevertheless, the enacting State might decide to use some other term or definition if it is commonly used in the State to refer to this type of "business presence".

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

46. In incorporating article 3, to the extent that it is considered useful by the enacting State, it may be noted that the exception for international obligations is meant to refer to obligations at the intergovernmental level, and not to mere commercial agreements concluded by entities of the State.

Article 4. Competent authority

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts or authority competent to perform those functions in the enacting State].

"A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

"Nothing in this Law affects the provisions in force in this State governing the authority of [insert the designation of the government-appointed person or body]."

47. If in the enacting State any of the functions mentioned in article 4 are performed by an authority other than
a court, the State would insert in article 4 and in other appropriate places in the enacting legislation the name of the competent authority.

48. The competence for the various judicial functions dealt with in the Model Provisions may lie with different courts in the enacting State, and the enacting State would tailor the text of the article to its own system of court competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the insolvency legislation for the benefit of, in particular, foreign representatives and foreign courts.

49. It is important to note that, in defining jurisdiction in matters mentioned in article 4, the implementing legislation should not unnecessarily limit the jurisdiction of other courts in the enacting State, in particular to entertain requests by foreign representatives for provisional relief.

50. In a number of States, insolvency legislation has entrusted certain tasks relating to the supervision of the insolvency process to government-appointed officials. The scope and nature of their duties, which vary widely from State to State, may include, for example: [...]. It is not the purpose of the Model Provisions to interfere with the authority of such officials, a point that some enacting States may wish to clarify in the law, as indicated in the footnote.

Article 5. Authorization of [insert the title of the person or body administrating a liquidation or reorganization under the law of the enacting State] to act in a foreign State

A [insert the title of the person or body administrating a liquidation or reorganization under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding in this State under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

51. The intent of article 5 is to equip administrators or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings. The lack of such authorization in some States has proved to be an obstacle to effective international cooperation in cross-border cases. An enacting State in which administrators are already equipped to act as foreign representatives may decide to forgo inclusion of article 5.

52. It may be noted that article 5 is formulated to make it clear that the scope of the powers exercised abroad by the administrator would depend upon the foreign law and courts. Actions that the administrator appointed in the enacting State may wish to take in a foreign country will be actions of the type that are dealt with in the Model Provisions, but the authority to act in a foreign country does not depend on whether that country has enacted legislation based on the Model Provisions.

Article 6. Public policy exceptions

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

53. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted. With a view to achieving the objectives of the Model Provisions, it is desirable not to encourage resort to the public policy exception provided in article 6. Accordingly, article 6 should be enacted in at least as limited a formulation as that contained in the Model Provisions.

Chapter II. Access of foreign representatives and creditors to courts in this State

Article 7. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

54. The article is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular actions. Notably, the article does not deal with the allocation of competence of the courts in the enacting State for providing relief to the foreign representative.

Article 8. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

55. The limitation on jurisdiction over the foreign representative embodied in article 8 is not absolute. It is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. It does so by providing that an appearance in the courts of the enacting State for the purpose of requesting recognition would not expose the entire estate under the supervision of the foreign representative to the jurisdiction of those courts. Other possible grounds for jurisdiction under the laws of the enacting State are not affected.

56. The article may appear superfluous in States where the rules on jurisdiction do not allow a court to assume jurisdiction over a person making an application to the court on the sole ground of the applicant’s appearance. Nevertheless, also in those States it would be useful to enact the article so as to eliminate the concern of foreign representatives or creditors over the possibility of all-embracing jurisdiction triggered by an application for relief.

Article 9. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

[Upon recognition,] a foreign representative may apply to commence a proceeding in this State under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding under the law of this State are otherwise met.

57. In national laws that, in enumerating persons who may request the commencement of an insolvency proceed-
ing, do not mention a representative of a foreign insolvency proceeding, it might be doubtful whether such a representative has standing for making the request. Article 9 is designed to ensure that the foreign representative [subject to recognition of the foreign proceeding] has standing for requesting the opening of an insolvency proceeding. However, the article does not modify the conditions under which an insolvency proceeding may be commenced in the enacting State.

Article 10. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative may participate in a proceeding concerning the debtor in this State under [identify laws of the enacting State relating to insolvency].

58. The purpose of the provision is to ensure that, in the insolvency proceeding concerning the debtor, the foreign representative will be given standing to make petitions, requests or submissions concerning issues, such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding. Notably, the provision does not vest the foreign representative with any specific powers or rights. The provision does not specify the kinds of motions the foreign representative might make and does not affect the provisions in the insolvency law of the enacting State that govern the fate of the motions.

59. If the law of the enacting State uses a term other than “participate” (e.g. “intervene”) to express the concept, such other term may be used in enacting the provision. It should be noted, however, that the expression “intervene”, as used in article 20, covers a case where the foreign representative takes part in an individual action by or against the debtor (as opposed to a collective insolvency proceeding).

Article 11. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding in this State under [identify laws of the enacting State relating to insolvency] as creditors in this State.

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of unsecured non-preference claims], while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims.

60. With the exception contained in paragraph (2), the article embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such proceeding, should not be treated worse than local creditors.

61. Paragraph (2) makes it clear that the principle of non-discrimination embodied in paragraph (1) leaves intact the provisions on the ranking of claims in insolvency proceedings, including any provisions that might assign a special ranking to claims of foreign creditors. However, lest the non-discrimination principle should be emptied of its meaning by provisions giving the lowest ranking to foreign claims, paragraph (2) establishes the minimum ranking for claims of foreign creditors: the rank of general unsecured claims. The exception to that minimum ranking is provided for the cases where the claim in question, if it were of a domestic creditor, would be ranked lower than general unsecured claims (such low-rank claims may be, for instance, those of a State authority for financial penalties or fines or claims whose payment is deferred because of a special relationship between the debtor and the creditor). Those special claims will receive the rank below the general unsecured claims, as provided in the law of the enacting State.

62. The alternative provision in the footnote differs from the provision in the text only in that it allows discrimination against foreign tax and social security claims.

Article 12. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have an address in this State. [The court may order that appropriate steps be taken with a view to notifying any creditors whose address is not yet known.]

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court.

63. The main purpose of notifying foreign creditors as provided in paragraph (1) is to inform them of the commencement of the insolvency proceeding and of the time limit to file their claims. However, since in many cases the
deadline for filing claims is not established in the notification issued upon the commencement of the proceeding, and since crucial information may be conveyed in subsequent notifications to creditors, it is necessary to require, as it is done in paragraph (1), that foreign creditors be notified whenever notification is required for creditors in the enacting State.

64. In some legal systems a secured creditor who files a claim in the insolvency proceeding is deemed to have waived the security or some of the privileges attached to the credit. Where such a situation may arise, it would be appropriate for the enacting State to include in paragraph (3) a requirement that the notification should include information regarding the effects of filing secured claims.

65. As to the form of the notification to be given to foreign creditors, States have different provisions or practices (e.g. publication in the official gazette or in local newspapers, individual notices, affixing notices within the court premises or a combination of any such procedures). If the form of notification were to be left to national law, foreign creditors would be in a less advantageous situation than local creditors, since they typically do not have direct access to local publications. For that reason, paragraph (2) as a matter of principle requires individual notification for foreign creditors, but nevertheless leaves discretion to the court to decide otherwise (e.g. if individual notice would entail excessive cost or would not seem feasible under the circumstances).

Chapter III. Recognition of a foreign proceeding and relief

Article 13. Recognition of a foreign proceeding and of a foreign representative

(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative’s appointment.

(2) An application for recognition shall be accompanied by:

(a) the duly authenticated decision [or decisions] commencing the foreign proceeding and appointment of the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) Subject to article 14, the foreign proceeding shall be recognized:

(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor’s main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

(4) Absent proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is deemed to be the centre of the debtor’s main interests.

(5) If the decision or certificate referred to in paragraph (2) of this article indicates that the foreign proceeding is a proceeding as defined in article 2(a) and that the foreign representative has been appointed within the meaning of article 2(d), the court is entitled to so presume.

(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

(8) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

66. The article defines the core procedural requirement for an application by a foreign representative for recognition. In incorporating the provision into national law, it is particularly desirable not to encumber the process with additional documentary requirements beyond those referred to.

67. The requirement, in paragraph (2)(a), that the decision commencing the foreign proceeding must be duly “authenticated” means that the copy of the court order or decision commencing or confirming the commencement of the foreign proceeding must bear a clause, seal or other mark that is normally used to attest that the document is a true copy and that it originates from the stated source. Apart from that, as stated in paragraph (6), the document need not be “legalized”, i.e. need not be presented to the authorities (e.g. consular agents) that are competent for inspecting and appropriately marking certain types of documents to be used outside their country of origin. Again, one important reason to avoid unnecessary formalities is the need for speed to secure assets and reduce the likelihood of the assets being concealed.

68. The basic distinction is drawn in paragraph (3) between foreign proceedings categorized as “main” proceedings, and those foreign proceedings that are not so characterized, depending upon the jurisdictional basis of the foreign proceeding. The relief flowing from recognition may depend upon the category into which a foreign proceeding falls. For example, recognition of a foreign “main” proceeding triggers a stay of individual creditor actions against assets.

69. It is not advisable to include several criteria for qualifying a foreign proceeding as a “main” proceeding and provide that on the basis of any of those criteria a proceeding could be deemed a main proceeding. Such a “multiple criteria” approach would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding.

Article 14. Grounds for refusing recognition

[Subject to article 6] recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:
(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(a); or

(b) . . . 1

1Subparagraph (b) would be the appropriate location for including any additional ground for refusing to recognize a foreign proceeding, should the Commission so decide.

70. [To be drafted in light of the decision of the Commission on the content of the article.]

Article 15 Relief upon application for recognition of a foreign proceeding

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where necessary to protect the assets of the debtor or the interests of the creditors, grant any relief mentioned in article 17.

(2) [Insert provisions (or refer to provisions in force in the enacting State) relating to notice].

(3) Unless extended under article 17(1)(c), the relief granted under this article terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

71. Article 15 deals with relief that may be ordered at the discretion of the court (similarly as relief under article 17) and is available as of the moment of the application for recognition (unlike relief under article 17, which is available upon recognition).

72. Relief available under article 15 is provisional in that, as provided in paragraph (3), the relief terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure, as provided in article 17(1)(c), which the court might wish to do, for example, to avoid a hiatus between the provisional measure issued before recognition and the measure issued after recognition.

73. It is useful to allow under article 15(1) all relief that might be allowed under article 17, since, to the extent such relief is needed, the need typically exists equally before and after recognition.

74. Relief under article 15 is not made subject to exceptions or limitations applicable under the law of the enacting State, as is provided in article 16(2). The reason is that relief under article 15 (as well as article 17) is discretionary and there is, therefore, no need to make the issuance of the discretionary relief subject to exceptions and limitations contained in the law of the enacting State.

75. Laws of many States contain requirements for notice to be given (either by the insolvency administrator upon the order of the court or by the court itself) when relief of the type mentioned in article 15 is granted. Paragraph (2) is the location where the enacting State should make appropriate provision for such notice.

Article 16. Effects of recognition of a foreign main proceeding

(1) Upon recognition of a foreign main proceeding,

(a) the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities are stayed;

(b) the right to transfer, dispose of or encumber any assets of the debtor are suspended.

(2) The scope of the stay and suspension referred to in paragraph (1) of this article is subject to [refer to any exceptions or limitations that are applicable under laws of the enacting State relating to insolvency].

(3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings, to the extent this is necessary to preserve a claim against the debtor.

(4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under [identify laws of the enacting State relating to insolvency] or the right to file claims in such a proceeding.

(5) This article does not apply if, at the time of application for recognition, a proceeding is pending concerning the debtor under [identify laws of the enacting State relating to insolvency].

76. While relief under articles 15 and 17 is discretionary, the effects provided by article 16(1) are not, i.e. they either flow automatically from recognition of the foreign main proceeding or, if an appropriate court order is needed for those effects to become operative, the court must issue the order. Notwithstanding the "mandatory" nature of the relief under article 16, its scope depends on exceptions or limitations that may exist in the law of the enacting State (e.g. as regards the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, or completion of open financial-market transactions). Another difference between relief under articles 15 and 17 and the effects under article 16 is that the relief under articles 15 and 17 may be issued in favour of main as well as non-main proceedings, while the effects of article 16 apply only to main proceedings.

77. Paragraph (1)(a) refers to both “individual actions” and “individual proceedings” in order to cover, in addition to “actions” by creditors in a court against the debtor or its assets, also enforcement measures initiated by creditors outside judicial proceedings, measures that creditors are allowed to take under certain conditions in some States.

78. It would not be feasible for the Model Provisions to deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under paragraph 16(1)(b). The sanctions vary in legal systems, and might include criminal sanctions, penalties and fines, or the acts themselves might be void or capable of being set aside. It should be noted that, from the viewpoint of creditors, the main purpose of such sanctions is to facilitate recovery for the insolvency proceeding of any assets improperly transferred by the debtor and that, for
that purpose, the avoidance of such transactions is preferable to the imposition of criminal or administrative sanctions on the debtor.

79. Article 16 does not address the effect of the stay pursuant to paragraph (1)(a) on the running of the limitation period for claims or individual court actions. With a view to avoiding adverse effects to creditors affected by the stay under paragraph (1)(a), paragraph (3) authorizes the commencement of individual actions but only to the extent necessary to preserve claims against the debtor. Once the claim has been preserved, the action continues to be covered by the stay. If in the enacting State it is provided that the stay of the kind envisaged in paragraph (1)(a) triggers the interruption of the running of limitation periods, the enacting State may decide not to enact paragraph (3).

Article 17. Relief that may be granted upon recognition of a foreign proceeding

(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of the debtor or the interests of creditors, the court may, at the request of the foreign representative, grant any appropriate relief including:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities, to the extent they have not been stayed under article 16 (1)(a);
(b) suspending the right to transfer, dispose of or encumber any assets of the debtor to the extent they have not been suspended under article 16(1)(b);
(c) extending relief granted under article 15;
(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;
(e) entrusting the administration and realization of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court;
(f) granting any additional relief that may be available to [insert the title of a person or body administering a liquidation or reorganization under the law of the enacting State] under the laws of this State.

(2) Upon recognition of a foreign main or non-main proceeding, the court may entrust the distribution of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

(3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding.

80. Relief envisaged by article 17 may be granted upon recognition of the foreign proceeding (unlike relief under article 15, which is available upon application for recognition).

81. Relief under article 17 is discretionary, as is the case with relief under article 15. This makes it possible to tailor the relief to the needs of the case. One particular factor to be taken into account in adapting relief to the circumstances of the case is whether the relief is for a foreign main or non-main proceeding. The interests and the authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding, who normally seeks to gain control over all assets of the insolvent debtor. Paragraph (3) emphasizes that point by providing a binding guideline to be observed by the court when it grants relief in favour of a foreign non-main proceeding.

82. The explanation relating to the use of the expressions “individual actions” and “individual proceedings” in article 16(1)(a) applies also to article 17(1)(a).

83. As to the “turnover” of assets to the foreign representative (or another person), as envisaged in paragraph (2), it should be noted that the Model Provisions contain several safeguards designed to ensure the protection of local interests, such as: the general statement of the principle of protection of local interests in article 19(1); the notice requirement, provided in the interest of local creditors and other interested local persons, does not describe in detail the kind of information to be provided in the notice. If the court considers it necessary that particular information be included in the notice (e.g. about the stay and suspension pursuant to article 16 or the relief granted under article 17), the court may give an appropriate order to the foreign representative, as a condition for granting relief, pursuant to article 19(2).

Article 18. Notice of recognition and relief granted upon recognition

Notice of recognition of a foreign proceeding [and of the effects of recognition of a foreign main proceeding under article 16(1)] shall be given in accordance with [the procedural rules governing notice of [the commencement of] a proceeding under the insolvency laws of this State].

84. The notice requirement, provided in the interest of local creditors and other interested local persons, does not describe in detail the kind of information to be provided in the notice. If the court considers it necessary that particular information be included in the notice (e.g. about the stay and suspension pursuant to article 16 or the relief granted under article 17), the court may give an appropriate order to the foreign representative, as a condition for granting relief, pursuant to article 19(2).

Article 19. Protection of creditors and other interested persons

(1) In granting or denying relief under article 15 or 17, and in modifying or terminating relief under this article, the court [shall take into account the interests of the creditors and other interested persons, including the debtor] must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

(2) The court may subject such relief to conditions it considers appropriate.

(3) Upon request of a person or entity affected by relief granted under article 15 or 17, or by the stay or suspension pursuant to article 16(1), the court may modify or terminate such relief [or stay or suspension] [taking into account the interests of the creditors and other interested persons, including the debtor].

85. The article makes the consequences of articles 15, 16 and 17 subject to court-imposed conditions and allows
those consequences to be modified and terminated by the court. Furthermore, the article expressly gives standing to the parties who may be affected by the consequences of articles 15, 16 and 17 to petition the court for those consequences to be modified and terminated. Thereby the provision provides effective underpinning to the policy, impliedly pursued at various places in the Model Provisions, that all affected interests in the enacting State should be given due regard in tailoring the relief that the Model Provisions make available to foreign proceedings. The article is intended to operate in the context of the procedural system of the enacting State.

Article 19 bis. Actions to avoid acts detrimental to creditors

Upon recognition of a foreign proceeding, the foreign representative [is permitted] [has standing] to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available, according to the law of the enacting State, to the local insolvency administrator in the context of insolvency proceedings in the enacting State].

86. The provision is drafted narrowly in that it is limited to conferring procedural standing to the foreign representative to bring such actions (to the same extent as a local insolvency administrator); in particular, the provision does not create any substantive right regarding the initiation of such action and also does not provide any conflict-of-laws solution for such actions.

87. The issue of court actions aimed at avoiding or otherwise rendering ineffective transactions by the debtor that are detrimental to creditors is of great complexity and the conditions under which such actions can be brought, or the law applicable to them, do not seem to lend themselves to harmonized solutions. However, since the right to commence such actions is essential to protect the integrity of the assets of the debtor, and is often the only realistic way to achieve such protection, it is important to ensure that such right would not be denied to a foreign representative on the sole ground that he or she has not been locally appointed.

88. It may be noted that under many national laws individual creditors have a right to bring actions to avoid or otherwise render ineffective acts detrimental to creditors. Such actions are typically governed by general provisions of law (such as the Civil Code) and are not necessarily tied to the existence of an insolvency proceeding against the debtor, and the right to bring them typically belongs to any affected creditor and not to other persons such as the person appointed to administer the debtor’s assets. Such actions do not fall within the scope of article 19 bis.

Article 20. Intervention by a foreign representative in actions in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in [individual actions] [proceedings] in which the debtor is a [claimant or defendant] [party].

89. The word “intervene” in the context of article 20 is intended to express the idea that the foreign representative has standing to appear in court and make representations in individual actions by the debtor against a third party or by a third party against the debtor. Many if not all national procedural laws contemplate cases where a party (the foreign representative in the current provision) who demonstrates a legal interest in the outcome of a dispute between two other parties may be permitted by the court to be heard in the proceedings. National procedural systems refer to such situations by different expressions, among which the expression “intervention” is frequently used. If the enacting State uses another expression for that concept, the use of such other expression in enacting article 20 would be appropriate.

90. It should be noted that the expression “participate” in article 10 refers to a case where the foreign representative makes representations in a collective insolvency proceeding, whereas the expression “intervene” in article 20 covers a case where the foreign representative takes part in an individual action by, or against, the debtor.

Chapter IV. Cooperation with foreign courts and foreign representatives

Article 21. Authorization of cooperation and direct communication with foreign courts and foreign representatives

(1) In matters referred to in article 1, a court referred to in article 4 shall cooperate to the maximum extent possible with foreign courts, either directly or through a [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] or a foreign representative. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

(2) In matters referred to in article 1, a [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] shall, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives. The [insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State] is permitted, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, to communicate directly with foreign courts or foreign representatives.

(3) Cooperation may be implemented by any appropriate means, including:
(a) appointment of a person or body to act at the direction of the court;
(b) communication of information by any means deemed appropriate by the court;
(c) coordination of the administration and supervision of the debtor’s assets and affairs;
(d) approval or implementation by courts of agreements concerning the coordination of proceedings;
(e) [coordination of multiple proceedings regarding the same debtor] [coordination of main or non-main foreign proceedings and a proceeding in this State under [identify laws of the enacting State relating to insolvency] in respect of the same debtor;
(f) [the enacting State may wish to list additional forms or examples of cooperation].
91. Article 21 is a core element in the Model Provisions in that it is designed to overcome a widespread lack in national legislation of provisions authorizing cooperation by domestic courts with foreign courts in administration of cross-border insolvencies. Enactment of such a legislative authorization may be particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. However, even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative empowerment and framework for cooperation has proven to be useful. The ability of courts, with appropriate involvement of the parties, to communicate “directly” and to request information and assistance “directly” from foreign courts or foreign representatives is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. This ability is critical when the courts consider that they should act with urgency.

92. Inclusion of the reference to international cooperation between persons who, under the supervision of their respective courts, administer the insolvency proceedings reflects the important role that such persons can play in devising and implementing cooperative arrangements, within the parameters of their authority and under overall supervision of the courts.

93. In view of the importance of emphasizing the expeditious character of the process envisaged, the enacting State may find it useful to indicate expressly that the courts are authorized to forgo use of the formalities (e.g. communication via higher courts, letters rogatory or other diplomatic or consular channels) that are inconsistent with the policy behind the provision and to address requests for information or assistance directly to foreign courts or foreign representatives.

94. Paragraph (3) is suggested to be used by the enacting State to provide courts with an indicative list of the types of cooperation that are authorized by article 21. Such an indicative listing may be particularly helpful in States with limited tradition of direct cross-border judicial cooperation, and in States where judicial discretion has traditionally been limited. Any listing of forms of possible cooperation should not purport to be exhaustive, as this might inadvertently preclude certain forms of appropriate cooperation.

95. Subparagraph (f) is a slot into which the enacting State may add additional forms of possible cooperation. Those might include, for example, suspension or termination of existing proceedings in the enacting State.

96. As a consequence of enactment of the Model Provisions, the enacting State would have in its legislation a system for recognition of foreign insolvency proceedings. This would include a method for distinguishing between foreign “main” and “non-main” proceedings. The next question that may arise in a legislator’s mind is what residual competence to commence an insolvency proceeding in the enacting State would remain once a foreign proceeding has been recognized. The question has particular significance in the case of recognition of a foreign proceeding as the “main” proceeding, which has the potential of having the most wide-reaching effects. In such cases the local “non-main” proceeding is sometimes referred to as a “secondary” proceeding. Article 22 presents the enacting State with a method of allocation of jurisdiction in cases in which a foreign main proceeding has been recognized. In such cases, commencement of an insolvency proceeding would be possible if the debtor has assets in the enacting State.

97. Enactment of paragraph (2) may have particular significance when proving insolvency as the prerequisite for the commencement of a local insolvency proceeding would be a time-consuming exercise and of little benefit bearing in mind that the debtor is already in an insolvency proceeding elsewhere and the opening of a local proceeding may be urgently needed for the protection of local creditors. Nonetheless, local criteria for showing insolvency remain operative through the proviso that evidence to the contrary would be acceptable.

Article 23. Rate of payment of creditors

Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding commenced in another State may not receive a payment for the same claim in a proceeding commenced in this State under [identify laws of the enacting State relating to insolvency] with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding commenced in this State proportionately less than the payment the creditor has already received.

98. The rule set forth in article 23, sometimes referred to as the “hotchpot” rule, is widely viewed as a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to ensure that a creditor, by participating in proceedings in more than one jurisdiction, does not receive a greater proportion of repayment of claims than that received by other creditors of the same class.

V. ASSISTANCE FROM THE UNCITRAL SECRETARIAT

(a) Assistance in drafting legislation

99. The UNCITRAL secretariat may assist States with technical consultations for the preparation of legislation based on the Model Provisions. Further information may be obtained from: the UNCITRAL secretariat, Vienna Inter-
national Centre, P.O. Box 500, A-1400 Vienna, Austria, fax (43-1) 26060-5813; electronic mail: uncitril@unov.un.or.at

(b) Information on interpretation of legislation based on Model Provisions

100. Once enacted, the Model Provisions will be included in the system for collecting and disseminating information on case law relating to the Conventions and Model Laws that have emanated from the work of the Commission (Case Law on UNCTRAL Texts (CLUDT)). The purpose of the system is to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of them. The Secretariat publishes, in the six languages of the United Nations, abstracts of decisions and makes available, in the original language, the decisions on the basis of which the abstracts were prepared. The system is explained in document A/75/4/SER.O/GUIDE/1, available from the Secretariat. Currently, CUDT covers the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 1980, The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), the UNCITRAL Model Law on International Commercial Arbitration (1985) and the United Nations Convention on the Carriage of Goods by Sea (1978) "Hamburg Rules".

[It is suggested to include the following material at an appropriate place in the publication in which the Model Provisions and this Guide will be published:]

The Model Provisions were adopted by the United Nations Commission on International Trade Law (UNCITRAL) [at its thirtieth session (Vienna, 12-30 May 1997).] [Action by the General Assembly].

In addition to the 36 member States of the Commission, representatives of many other States and of a number of international intergovernmental and non-governmental organizations participated in the deliberations. The project, initiated in close cooperation with the International Association of Insolvency Practitioners (INSOL), benefited from suggestions and expert advice from practitioners from many countries such as administrators of insolvent debtors' assets, attorneys, judges and officials concerned with insolvency matters. Consultations were facilitated, apart from INSOL, by Committee J (Insolvency) of the Section on Business Law of the International Bar Association (IBA) and the Commission on International Bankruptcy Law of the International Association of Lawyers.

After a preliminary discussion on the project by the Commission in 1993,1 and prior to the decision to undertake work on cross-border insolvency, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, Austria, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders. The suggestion arising from the Colloquium was that work by the Commission should, at least at the initial stage, have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.2 Subsequently, an international meeting of judges was held specifically to elicit their views as to work by the Commission in that area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, Toronto, Canada, 22-23 March 1995). The view of the participating judges and government officials was that it would be worthwhile for the Commission to provide a legislative framework for judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.3

The decision to develop a legal instrument relating to cross-border insolvency was taken at the twenty-eighth session of the Commission (Vienna, 2-26 May 1995).4 The work was assigned to the Working Group on Insolvency Law, one of the Commission's intergovernmental subsidiary bodies. The Working Group devoted four two-week sessions to the work on the project.5

After the last of those Working Group sessions, the Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency was held (22-23 March 1997) in conjunction with the 5th World Congress of the International Association of Insolvency Practitioners (INSOL) (New Orleans, United States of America, 22-26 March 1997). The Colloquium considered the draft Model Provisions as they were prepared by the Working Group. The participants, mostly judges and government officials, were generally supportive of the draft, expressed suggestions on the substance of several provisions, and considered that the Model Provisions, when enacted, would constitute a major improvement in dealing with cross-border insolvency cases.

Further colloquia involving judges and other practitioners are planned to be held to consider the experience with the Model Provisions.


3The report on the Judicial Colloquium was published as document A/49/413 (reproduced in UNCTRAL Yearbook, vol. XXVI: 1995, part two, IV, A); the report was considered at the twenty-eighth session of the Commission (Vienna, 22-26 May 1995); the considerations are reflected in Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 382-393 (see UNCTRAL Yearbook, vol. XXVI: 1995, part one, A).


II. ASSIGNMENT IN RECEIVABLES FINANCING


(A/CN.9/432) [Original: English]

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INTRODUCTION

1. At its twenty-sixth to twenty-eighth sessions (1993-1995), the Commission considered three reports by the Secretariat concerning certain legal problems in the area of assignment of receivables (A/CN.9/378/Add.3, A/CN.9/397 and A/CN.9/412). In those reports it was 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 assignee, the assignee and the debtor would not be in the same country) and as to the effects of such assignments on the debtor and other third parties.1

2. At its twenty-eighth session (Vienna, 2-26 May 1995), the Commission decided to entrust the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing.2

3. The Working Group commenced its work at its twenty-fourth session by considering a number of preliminary draft uniform rules contained in a report by the Secretary-General entitled “Discussion and preliminary draft of uniform rules” (A/CN.9/412). At that session, the Working Group was urged to strive for a legal text aimed at increasing the availability of credit (A/CN.9/420, para. 16). At the conclusion of that session, the Working Group requested the Secretariat to prepare a revised version of the draft uniform rules on assignment in receivables financing (A/CN.9/420, para. 204).

4. The Working Group, which was composed of all States members of the Commission, continued its work at its twenty-fifth session, held in New York from 8 to 19 July 1996, pursuant to a decision taken by the Commission at its twenty-ninth session (New York, 28 May-14 June 1996).3 The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Botswana, Bulgaria, Chile, China, Egypt, Finland, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Poland, Russian Federation, Singapore, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and United States of America.

5. The session was attended by observers from the following States: Canada, Colombia, Croatia, Czech Republic, Haiti, Ireland, Israel, Lebanon, Morocco, Netherlands, Republic of Korea, Slovenia, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Arab Emirates, Venezuela and Yemen.

6. The session was attended by observers from the following international organizations: Commercial Finance Association (FCA), Factors Chain International (FCI), Federación Latinoamericana de Bancos (FELABAN), Banking Federation of the European Union, Hague Conference on Private International Law and International Chamber of Commerce (ICC).

7. The Working Group elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)
Rapporteur: Mr. Ricardo Sandoval López (Chile)

2Ibid., Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.
3Ibid., Fifty-first Session, Supplement No. 17 (A/51/17), paras. 231-234.

8. The Working Group had before it the provisional agenda (A/CN.9/WP.II/WP.86) and a note by the Secretariat containing revised articles of draft uniform rules on assignment in receivables financing (A/CN.9/WG.II/WP.87).

9. The Working Group adopted the following agenda:
1. Election of officers.
2. Adoption of the agenda.
3. Preparation of uniform law on assignment in receivables financing.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS


11. At the conclusion of the session, the Working Group requested the Secretariat to revise the draft uniform rules, taking into account the deliberations and conclusions of the Working Group as set forth in section III.

II. DRAFT UNIFORM RULES ON ASSIGNMENT IN RECEIVABLES FINANCING

A. Title

12. The Working Group postponed the discussion of the title of the draft uniform rules until it had completed its review of the substantive provisions.

B. Consideration of draft articles

Chapter I. Scope of application and general provisions

Article 1. Scope of application

13. The text of draft article 1 as considered by the Working Group was as follows:

“(1) [This Convention] [This Law] applies to assignments of international receivables [and to international assignments of receivables made]

“Variant A: for financing or any other commercial purposes,

“Variant B: in the context of financing contracts.

“(a) [if the assignor and the debtor have their places of business in a Contracting State] [if the assignor or the debtor has its place of business in this State]; or

“(b) if the rules of private international law lead to the application of the law of a Contracting State.

“(2) A receivable is international if the places of business of the assignor and the debtor are in different
Substantive scope of application

14. The Working Group considered the question whether the scope of application of the draft uniform rules should be limited by reference to the “financing” or “commercial” purpose of the assignment. The discussion focused on the text of variants A and B in paragraph (1) of draft article 1. It was generally felt that wording along the lines of variant A would introduce an unacceptable degree of uncertainty as to the scope of the draft uniform rules, since their application would depend on an interpretation of the assignment with a view to ascertaining its purpose.

15. As to variant B, which was intended to define the scope of the draft uniform rules in a broad yet practical way by referring to assignments made “in the context of financing contracts”, the Working Group generally felt that it would also lead to unacceptable uncertainty, since it would require a determination to be made as to which transactions were within the “context” of a given financing contract. In addition, the view was expressed that a definition of “financing contract”, although it might enhance certainty, would run the risk of excluding some practices that should be covered by the draft uniform rules.

16. After discussion, the Working Group decided that both variants A and B should be deleted. Concerns were expressed that the deletion of both variants resulted in excessively broadening the scope of the draft uniform rules. It was stated that adopting such a broad scope of application might adversely affect the acceptability of the draft uniform rules. It was also stated that the draft uniform rules had been intended initially to cover specific types of assignments, namely assignments made for securing credit. While the view was expressed that all assignments were made for financing purposes, it was widely felt that rules specifically intended for application in the context of financing contracts might not be appropriate for all types of assignments. Examples were given of situations, such as assignments of claims against consumers, assignments of claims derived from insurance contracts and assignments made for collection purposes, where rules might be needed that differed from the draft uniform rules.

17. Support was expressed in favour of listing in draft article 1 specific kinds of assignments, which would be excluded from the broad scope of application of the draft uniform rules. In particular, support was expressed for excluding assignment of claims against consumers. The prevailing view, however, was that it would be premature to single out any kind of transaction to be excluded from the scope of the draft uniform rules before the substantive provisions of the draft uniform rules had been considered. For example, with respect to consumers, it was stated that the provisions contained in draft article 6 might be found to provide sufficient protection. Furthermore, it was pointed out that expressly excluding consumer transactions from the scope of the draft uniform rules might raise difficult questions as to the definition of “consumer”. In that connection, it was noted that the issues of consumer protection had been discussed in the context of the preparation of both the UNICITRAL Model Law on International Credit Transfers and the Model Law on Electronic Commerce. Exclusion of consumer transactions from the scope of those two instruments had been suggested and eventually avoided, since it was found too difficult to provide a definition of “consumer” that would be acceptable internationally, and since it was recognized that in certain situations, both Model Laws might provide an adequate level of consumer protection.

18. After discussion, the Working Group decided that the broad scope of application resulting from the deletion of both variants A and B should be maintained, subject to possible exceptions to be identified and discussed further after review of the substantive provisions of the draft uniform rules had been completed.

Internationality

19. It was noted that the opening words of draft article 1 reflected the approach generally supported by the Working Group at its previous session that the draft uniform rules should cover both international and domestic assignments of international receivables (A/CN.9/420, para. 26). The discussion focused on the words between square brackets (“and to international assignments of receivables made”), which would result in the draft uniform rules covering international assignments of domestic receivables.

20. It was widely felt that coverage of international assignments of domestic receivables could facilitate receivables financing by providing domestic traders with easier access to international financial markets. In addition, such an approach could enhance competition among financing institutions with the beneficial result of lowering the cost of credit. It was stated that excluding domestic receivables from the scope of the draft uniform rules would unduly restrict the availability of financing through assignment of receivables that corresponded to a large portion of business activities. In addition, such an exclusion might lead to practical difficulties for financing institutions if a determination had to be made prior to the granting of credit as to the domestic or international nature of a given receivable.

21. However, various concerns were expressed with respect to broadening the scope of application of the draft uniform rules to cover international assignments of domestic receivables. One concern was that adopting a broad scope of application might lead to undesirable results for the domestic debtor, in particular if it were a consumer, whose legal position was made subject to a different legal regime merely because the domestic creditor had chosen to assign its receivables to a foreign assignee. Another concern was that broadening the scope of the draft uniform rules to cover international assignments of domestic receivables might raise questions as to possible conflicts between the domestic law applicable to a domestic receivable and the draft uniform rules that would become applicable as a result of the international assignment of that domestic receivable.
22. It was suggested that a provision along the lines of article 1(2) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as “the United Nations Sales Convention”) should be included to the effect that the application of the draft uniform rules would depend upon all the parties involved (i.e. assignor, assignee and debtor) being aware of the international character of the assignment. An additional suggestion was that the debtor, upon notification of the assignment, should be entitled to object to any change to the legal regime governing its relationship with the assignor. Those proposals were objected to on the grounds that introducing a rule under which the assignment should be brought to the attention or made subject to the consent of the debtor might introduce uncertainty, and invite litigation, as to whether the debtor in fact knew of or consented to the assignment. It was stated that such a rule would detract from the objective of the draft uniform rules to enhance the availability of credit.

23. With a view to alleviating the above-mentioned concerns, it was recalled that draft article 6 provided that the international assignment of a given receivable should not result in adversely affecting the legal position of the debtor. In addition, it was stated that the application of the draft uniform rules to the assignment did not conflict with the application of the domestic law that governed the relationship between the assignor and the debtor prior to the assignment, and would continue to govern that relationship irrespective of the international character of the assignment. Furthermore, it was stated that, in practical terms, the debtor might not have a particular interest in being made aware of the assignment, since in many cases payment would be made to the assignor acting on behalf of the assignee.

24. After discussion, the Working Group decided that the scope of the draft uniform rules should be broadly drafted to cover both assignments of international receivables and international assignments of domestic receivables, thus excluding only domestic assignments of domestic receivables.

25. As a consequence of the decision made as to the scope of the draft uniform rules in the context of paragraph (1), it was agreed that paragraph (2) of draft article 1 should establish criteria for assessing the internationality of both a “receivable” and an “assignment”. It was decided that the text in square brackets (“An assignment is international if the places of business of the assignor and the assignee are in different States”) should be retained without the brackets. As a matter of drafting, it was pointed out that the reference to “place of business” might need to be included. An additional suggestion was that the debtor, upon notification of the assignment, should be entitled to object to any change to the legal regime governing its relationship with the assignor. Those proposals were objected to on the grounds that introducing a rule under which the assignment should be brought to the attention or made subject to the consent of the debtor might introduce uncertainty, and invite litigation, as to whether the debtor in fact knew of or consented to the assignment. It was stated that such a rule would detract from the objective of the draft uniform rules to enhance the availability of credit.

26. The Working Group generally felt that, for the purpose of defining the territorial scope of application of the draft uniform rules, as well as for the purpose of specific provisions such as draft articles 4 and 21 to 23, a working assumption needed to be made as to whether the draft uniform rules would be in the form of a convention or a model law.

27. In support of preparing a model law, it was observed that a model law would afford enacting States a greater degree of flexibility in adjusting the draft uniform rules to their national legislation. In support of preparing a convention, it was observed that a convention would achieve a higher degree of certainty in the law applicable to receivables, thus leading to a positive impact on the availability and the cost of credit. In addition, it was observed that a convention could better achieve the goal of establishing, along with the UNIDROIT Convention on International Factoring (hereinafter referred to as “the Factoring Convention”), a comprehensive legal regime on assignment.

28. After consideration, the Working Group decided to adopt as a working assumption that the text being prepared would take the form of a convention. It was agreed that the Working Group would have to reconsider that assumption at a future session in view of the specific content of the draft uniform rules. In the light of that decision, the Working Group decided to delete the second bracketed language in paragraph (1)(a) and to retain the remaining language without the brackets.

Territorial scope of application

29. The Working Group next considered the question of the factors that would trigger the territorial application of the draft uniform rules. It was noted that, under paragraph (1)(a), for the draft convention to apply, it was necessary that the assignor and the debtor had their places of business in a contracting State. It was generally felt that, in order to assess the merits of such a provision, it might be useful to set out the possible disputes which the draft convention might be called upon to resolve. The dispute situations that were identified involved the following issues: rights of the assignee against the assignor flowing from the breach of a warranty; enforcement of the receivables by the assignee against the assignor; discharge of the debtor; defences of the debtor towards the assignee; relative rights of the assignee and the administrator in the insolvency of the assignor; relative priority rights of the assignee and a competing assignee; and effectiveness of subsequent assignments.

30. Differing views were expressed as to the question whether all or only some of the parties to the above-mentioned dispute situations should have their places of business in a contracting State. One view was that in most cases certainty and predictability would be best served if the only condition for the territorial application of the draft convention was that the assignor had its place of business in a contracting State. Another view was that the debtor too should have its place of business in a contracting State, so as to accommodate situations where a dispute arose in the context of the relationship between the debtor and the assignee. In such a case, enforcement of the assigned receivable would normally be sought in the State where the debtor had its place of business. Yet another view was that, in
addition to the assignor and the debtor, and in order to address all possible disputes that might arise in the context of assignment, the assignee too should have its place of business in a contracting State, or even other parties, such as creditors of the assignor (including the administrator in the insolvency of the assignor), competing assignees and subsequent assignees. Yet another view was that which parties needed to have their places of business in a contracting State for the purpose of the application of the draft convention could depend on the nature of the issues addressed.

31. It was observed that requiring all the parties to the various disputes that might arise in the context of assignment to have their places of business in a contracting State would result in a more comprehensive coverage of those disputes by the draft convention. At the same time, however, it was pointed out that adopting such an approach might overly restrict the sphere of application of the draft convention. After discussion, the Working Group requested the Secretariat to revise draft article 1(1)(a) and to present variants reflecting the views expressed for consideration at a future session.

32. As to paragraph (1)(b) providing for the application of the draft convention by virtue of the rules of private international law, the Working Group decided to retain it within square brackets pending consideration of the variants to be prepared by the Secretariat on paragraph (1)(a).

Mandatory or non-mandatory character of the rules

33. Differing views were expressed as to whether the provisions of the draft convention should be mandatory or not. One view was that the parties to the assignment transaction should be able to opt out of the draft convention as a whole. In support of that view, it was stated that freedom of parties to determine the law applicable to their relationship was an important principle which should not be interfered with and the adoption of which would make the draft convention more easily acceptable. Another view was that the debtor too should be able to exclude the application of the draft convention in the context of the original contract. It was argued that debtors might have an interest in excluding the application of the draft convention, for example if a no-assignment clause contained in the original contract were to be considered invalid under the draft convention.

34. While it was agreed that, under the generally applicable principle of party autonomy, the assignor and the assignee should be able to choose the law applicable to their transaction, the view was expressed that such a choice should not affect the rights of the debtor and other third parties. In support of that view, it was stated that a general opting-out clause would result in third parties having to examine the exact terms of the assignment, or of previous assignments in a chain of refinancing contracts, in order to determine whether the application of the draft convention had been excluded or not. If the right to opt out of the draft convention was also extended to the debtor, third parties might need to examine, in addition, the original contract between the debtor and the assignor. It was stated that such an approach would have the adverse effect of increasing the cost of credit. In response, it was stated that, in some cases, examination of the contracts and other relevant documents was a standard procedure, which was followed in any case by parties involved in financing transactions. On the other hand, it was observed that such an examination of documents was not standard practice for volume transactions.

35. A number of alternatives to a general opting-out provision were suggested. One suggestion was that the principle of freedom of contracts should be expressed in the context of article 8 in order to recognize the rights of the assignor and the debtor to determine whether certain receivables would be assignable and which rules should regulate a possible assignment. It was observed that such rights were already recognized under existing market practice, from which the draft convention should not depart.

36. Another suggestion was that consumers should at least be allowed to exclude the application of the draft convention. Objections were raised to this suggestion on a number of grounds, including that: it would not be easy to reach a generally agreeable definition of consumers; no useful purpose would be served by allowing consumers to opt out of the draft convention if consumers were acting as debtors, while the situation might be different only if consumers were acting as assignors; a general opting-out clause for consumers would result in excluding from the scope of application of the draft uniform rules a substantive practice involving the financing of domestic consumer receivables; the possibility for consumers to opt out would not increase their protection since most contracts between large corporations and consumers were in effect standard-term contracts which the consumers had little opportunity to negotiate in any case; and on many occasions, e.g. in the assignment of toll-road receipts, the consumer would have no interest in excluding the application of the draft convention. In that connection, it was pointed out that there was no reason why toll-road receipts stemming from payments made by consumers should be treated any differently from toll-road receipts coming from payments made by commercial or Government entities.

37. Yet another suggestion was that a way to uphold freedom of contract was to allow the parties to exclude the application of the draft convention, or to derogate from or vary the effect of its provisions, in so far as the draft convention related to their mutual rights and obligations but not to the rights and obligations of third parties. The concern was expressed that such an approach might create uncertainty as to the impact of an assignment on the rights of the debtor and other third parties. It was generally agreed, however, that while the draft convention was drafted against the general background of freedom of contract, derogation from those provisions in the draft convention that might affect the rights of the debtor and other third parties (e.g. articles 5-8, 13, 16 (3), 17 and 18) was not appropriate. Another reason for avoiding a general opting-out clause was said to be that a general opting-out clause might inadvertently result in excluding domestic rules of a mandatory nature. It was generally agreed that the mandatory or non-mandatory character of the rules contained in the draft convention depended on the type of relationship involved in each case. With respect to the relationship...
between the assignor and the assignee, the rules could be cast as non-mandatory, while the rules dealing with the relationship between the assignee and the debtor or other third parties should be of a mandatory nature in order to ensure effective protection of the debtor and other third parties.

38. After deliberation, the Working Group agreed that, while no general opting-out clause should be included in the draft convention, the question of whether the parties should be allowed to exclude the application of the draft convention, or to derogate from or vary the effect of its provisions that regulated their rights and obligations, should be considered in the context of each relevant article.

Article 2. Definitions

39. The text of draft article 2 as considered by the Working Group was as follows:

"For the purposes of this [Convention] [this Law]:

"(1) ‘Assignment’ means the agreement to transfer receivables from one party (‘assignor’) to another party (‘assignee’), by way of sale, by way of security for performance of an obligation, or by any other way except delivery and/or endorsement of a negotiable instrument.

"(2) ‘Financing contract’ means the contract in the context of which the assignor assigns its receivables to the assignee, while the assignee provides financing or other related services to the assignor or another person. Financing contracts include, but are not limited to, factoring, forfaiting, refinancing, in particular securitization, and project financing.

"(3) ‘Receivable’ means any right to receive or to claim the payment of a monetary sum in any currency for commodity easily convertible into money.

"(a) ‘Receivable’ includes, but is not limited to:

(i) any right arising from a contract (‘the original contract’) made between the assignor and a third party (‘the debtor’);

(ii) future receivables; [and]

(iii) partial and undivided interests in receivables.

"(b) ‘Receivable’ does not include: [...]"

"(4) ‘Future receivable’ means:

"(a) a receivable which, while arising from a contract existing at the time of assignment, is not due at the time of assignment or has not yet been earned by performance; and

"(b) a receivable that might arise from a contract expected to be concluded after the conclusion of the assignment.

"(5) ‘Consumer receivable’ means a receivable arising from a transaction made for personal, family or household purposes."

"(6) ‘Writing’ means any form of communication which preserves a complete record of the information contained therein and provides authentication of its source by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.

"(7) If a party has more than one place of business, the place of business is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the conclusion of that contract. If a party does not have a place of business, reference is to be made to its habitual residence.”

Paragraph (1) ("Assignment")

40. While there was general agreement as to the substance of paragraph (1), a number of observations and suggestions were made as to its exact formulation.

“‘Assignment’ means the agreement to transfer receivables from one party (‘assignor’) to another party (‘assignee’) . . .”

41. The Working Group noted that the term “agreement” had been inserted in the definition of “assignment” in order to avoid a tautology which would otherwise result from the combined application of paragraph (1) of draft article 2 and paragraph (1)(a) of draft article 6 ("an assignment transfers"). It was generally felt, however, that use of the term “agreement” in the definition of “assignment” might lead to the draft convention being misinterpreted as covering only the agreement to assign at a future date, thus creating obligations only as of the time when the receivables were actually assigned. With a view to avoiding such a misinterpretation, it was suggested that the words "agreement to transfer" should be replaced by the words "transfer by agreement".

42. Differing views were expressed as to the kinds of assignments that should be covered by the draft convention. One view was that the scope of the draft convention should be limited to assignments made by agreement. Involuntary assignments (e.g., garnishments) and assignments by operation of law should thus be excluded from the definition of “assignment” under the draft convention. In support of that view, it was stated that such non-contractual assignments were not commonly used for financing purposes. A contrary view was that transfers of receivables by operation of law should be covered by the draft convention alongside assignments made by agreement. As an example of such assignments by operation of law that were described as particularly important, it was stated that assignments of claims arising under insurance contracts should be covered by the draft convention. Yet another view was that the definition of “assignment” should refer to “transfer by written agreement” in order to exclude oral assignments from the scope of application of the draft convention.

43. As to the exact meaning of the terms “assignor”, “assignee” and “debtor”, a number of suggestions were made,
including that: they should be defined in more detail; categories of assignors, assignees or debtors should be included in (e.g. Governments and other public entities), or excluded from (e.g. individuals), the definition; and that the debtor should not be identified as a “third party” since that expression was used in the draft convention to indicate creditors of the assignor. In response to a query that was raised, it was stated that assignments of receivables from a parent to a subsidiary corporation or from otherwise closely connected corporations were covered by the current formulation of the definition of “assignment”.

44. It was noted that paragraph (2) of draft article 2 contained a reference not only to assignments for financing but also to assignments for servicing purposes. A suggestion was made that such a reference might need to be added to paragraph (1) as well, in order to recognize and facilitate an important practice relating to assignments.

“... by way of sale, by way of security for performance of an obligation, or by any other way ...”

45. It was observed that, in its current formulation, paragraph (1) might not adequately cover all assignment-related practices (e.g. subrogation, novation, pledge). It was generally felt that the definition of “assignment” should be reviewed to make it clear that all such practices fell within the scope of the draft convention. As a matter of drafting, it was suggested that, if the draft convention was intended to cover all categories of assignment, inspiration might be sought from the typology used in a number of jurisdictions, where all conceivable assignments were regarded as falling within one of the two following legal categories: “outright assignments” (which included assignments by sale or gift) and “security assignments”.

46. As to the reference to assignment “by way of sale” in the draft definition, the view was expressed that paragraph (1) might need to be revised in order to indicate more clearly that an agreement in the form of a sale of receivables might cover in fact a private security arrangement between the assignor and the assignee.

“... except delivery and/or endorsement of a negotiable instrument”

47. It was generally agreed that assignments made by way of endorsement of a negotiable instrument needed to be excluded from the scope of the draft convention to preserve the negotiability of the instrument and to allow the transferee to benefit from the protection afforded by special rules applicable to negotiable instruments. It was generally felt that, for the same reasons, the transfer of bearer documents by delivery without endorsement should also be excluded from the definition. It was also felt, however, that there was no reason to exclude the transfer of other undorsed negotiable instruments by delivery from the scope of the draft convention. It was pointed out that in many cases receivables existed both on the basis of a contract and in the form of a particular instrument, e.g. a promissory note, for the reason that the promissory note allowed the holder to obtain payment by way of summary proceedings

in court. It was suggested that the assignment of the receivable independently of the promissory note should not be excluded from the definition.

48. In addition, it was observed that, in its current formulation, paragraph (1) failed to exclude the transfer of paperless securities, which was subject to special rules but did not require any endorsement, since it was normally done by way of entry in a registry. It was suggested that paragraph (1) might need to be redrafted to make it clear that such transfers were excluded from the definition of “assignment”. In that connection, it was pointed out that, while receivables might flow from securities, securities as such would not fall under the definition of “receivable” in paragraph (3).

49. After discussion, the Working Group requested the Secretariat to redraft paragraph (1) taking into account the above-mentioned views, concerns and suggestions.

Paragraph (2) (“Financing contract”)

50. Differing views were expressed as to whether paragraph (2) should be deleted. In support of deletion, it was stated that, further to the deletion of variant B in article 1(1), under which the scope of the draft convention would have covered “assignments made in the context of financing contracts”, paragraph (2) was superfluous. In support of retention, it was observed that paragraph (2) was necessary to clarify a term used in the title of the draft convention, as well as in draft articles 10(4) and 12(2). In addition, it was pointed out that paragraph (2) contained a number of useful elements, including the reference to assignments for servicing purposes and the possibility that the assignor and the borrower might be two different persons.

51. A number of suggestions of a drafting nature were made, including: that the term “financing” should be replaced by the terms “money or credit”; and that the assignment for servicing purposes should be emphasized. In that connection, a concern was expressed that such a general formulation might inadvertently result in bringing within the scope of the draft convention transactions that should not be covered, such as cash-management arrangements.

52. After discussion, the Working Group decided to defer its decision on paragraph (2) until it had completed its review of draft articles 10(4) and 12(2) and the draft convention.

Paragraph (3) (“Receivable”)

53. There was general agreement that the essence of the receivables to be covered by the draft convention was adequately captured in the words “right to receive and to claim payment of a monetary sum”. Some doubt was expressed, however, as to whether that formulation sufficiently covered future cash flows, e.g. toll road receipts stemming from concession agreements, or royalties flowing from licence agreements, which should also be brought within the scope of application of the draft convention.
54. The view was expressed that the right to receive or to claim a commodity, which appeared in paragraph (3) within square brackets, could not be considered to be a "receivable" and should be deleted. It was added that commodity trading raised a number of complicated issues that the draft convention should not attempt to address. While it was agreed that the right to claim commodities could not be viewed as a "receivable", the view was expressed that lending of gold or other precious metals formed a significant practice that might be covered by the draft convention. The example was given of "loans" in gold in which the borrower was obliged either to return the gold or to buy it paying its price. While the Working Group was not opposed in principle to covering such transactions, the view was expressed that, to the extent that commodities were traded in organized markets which were subject to special rules, the draft convention should not deal with transfers of commodities.

55. After discussion, the Working Group found the substance of the chapeau of paragraph (3) to be generally acceptable. The Secretariat was requested to prepare a revised draft taking into account the views expressed and the suggestions made.

Subparagraph (a)

56. The Working Group noted that in subparagraph (a) certain types of receivables were listed that needed to be emphasized because of their importance (contractual receivables) or because of the doubt existing under certain legal systems as to their assignability (future receivables and partial and undivided interests in receivables).

57. The concern was expressed that an approach based on an enumeration of receivables to be covered by the draft convention was unnecessary, in view of the broad language used in the chapeau. Such an approach could, in addition, have the unintended result of excluding certain types of receivables that should be covered. In that connection, it was suggested that, in order to address that concern, it was suggested that the language used in the chapeau could possibly be supplemented with a view to achieving a sufficiently broad definition of "receivable".

58. In support of such a broad approach, it was observed that it would result in covering all the types of receivables that needed to be covered (e.g. future receivables, partial and undivided interests in receivables). In addition, it was stated that such an approach would enhance certainty in the application of the draft convention, since, for example, it would not be necessary to make a distinction between contractual and non-contractual receivables, which was not always easy to draw in view of the wide divergences existing among legal systems (e.g. claims for damages to goods caused by other goods, which in some legal systems might be based on contract, and in other legal systems on product liability, and claims from tortious breach of contract).

59. The Working Group found the approach based on a broad definition of receivables to be generally acceptable. For the purpose of clarification, a number of receivables that should be covered were cited, including: partial and undivided interests in receivables, which were important in the context of securitization and loan participations; government receivables, subject possibly to a special treatment of no-assignment clauses; insurance receivables, with the possible exception of receivables arising from reinsurance contracts; receivables arising from lease agreements relating to real property and equipment; receivables arising from licence and concession agreements; and receivables arising from, or confirmed by, court decisions.

60. As to the specific formulation of a broad definition of "receivable", a number of suggestions were made. One suggestion was to refer to contractual and non-contractual receivables, including liquidated damages and damages at large. Another suggestion was that subparagraph (a) should be moved to the chapeau and revised so as to read along the following lines: "any right to receive and to claim payment of a monetary sum in any currency, arising from a contract ("the original contract") made between the assignor and another party ("debtor"); a tort or any other source". In that connection, it was stated that, in order to align subparagraph (a)/(i) with the wording used in the chapeau, "right arising under a contract" should be qualified by reference to a "right to receive or to claim payment".

61. After deliberation, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (a) with a view to providing a broad definition of "receivable", taking into account the observations and suggestions made.

Subparagraph (b)

62. It was generally agreed that, in view of the broad approach taken by the Working Group with regard to the definition of assignments and receivables to be covered by the draft convention, it would be necessary to list receivables that should be excluded. In that connection, the view was expressed that excluded receivables could be listed in a separate paragraph or article along with assignments and, possibly, types of assignors, assignees and debtors to be excluded from the scope of the draft convention.

63. As to the types of receivables to be excluded from the sphere of application of the draft convention, a number of receivables were mentioned, including: employee-wage receivables, since those receivables were subject to special laws and no market existed involving financing on the basis of such receivables; receivables in connection with the sale of a business, since it was a sale and not a financing transaction; contractual receivables in cases in which the assignee was to perform the contract from which the receivables arose; deposit accounts, since they were subject to special regulation; private transactions; and tort receivables.

64. Differing views were expressed as to whether receivables arising from torts should be covered. One view was that there was no significant market involving the transfer of tort receivables for financing or servicing purposes. Another view was that, although tort receivables were normally not assigned for financing purposes, there was a significant market (e.g. for the transfer of insurance claims from the injured person to the insurance company) which should be covered by the draft convention.
65. In connection with its discussion of the financing purpose of the assignment of certain types of receivables, the Working Group resumed the exchange of views held in the context of draft article 1 as to whether the applicability of the draft convention should be linked to the purpose of the assignment. One view was that any reference to “financing” as the purpose of the assignment should be avoided since assignment-related practices existed outside the context of financing and such practices should also be covered by the draft convention. Another view was that only assignments for financing purposes should be covered and that the reference to the financing purpose of assignment contained in variant A of article 1(1) might need to be reintroduced.

66. The prevailing view, however, was that, while the focus of the draft convention should be on assignments made in order to secure financing or other related services, the Working Group was not prevented from adopting a broader approach so as to cover other types of assignment, as long as it did not attempt to cover all assignments, an approach which was said to be impractical and unnecessary. Accordingly, the Working Group confirmed the decision taken in the context of its discussion of draft article 1 that assignment should be defined in broad terms, and requested the Secretariat to introduce, at an appropriate place in the draft convention, a list of assignments, receivables and parties to be excluded from the scope of the draft convention.

67. During the discussion, the question was raised as to whether the aim of the draft convention was to harmonize and replace assignment-related rules currently existing under national laws or, rather, to create a new type of assignment, while preserving existing rules of national laws. In support of the latter approach, it was stated that international financial markets could benefit from a uniform law which would add a new type to the already existing types of assignment and which would be tailor-made to meet the financing needs of the marketplace. In addition, it was pointed out that attempting to replace existing assignment practices might be unrealistic and unnecessary. The view was expressed that, if the draft convention were to establish a new type of assignment available to parties along with national assignment-related practices, a mechanism should be devised to trigger the application of the draft convention. In that regard, reference was made to an opting-in or opting-out clause. In view of the decision of the Working Group, taken in the context of its discussion on article 1, not to incorporate a general opting-out clause but to consider the possibility of allowing parties to opt-out, derogate from or vary specific provisions of the draft convention, the suggestion was made that the possibility of an opting-in approach should also be considered.

68. In support of an approach aimed at harmonizing national assignment-related practices, it was observed that it would achieve a higher degree of certainty and predictability, which was essential to the unhindered development of receivables financing. It was stated that such an approach had already been successfully taken in a number of UNCTAD conventions, notably the United Nations Sales Convention. Moreover, it was argued that, while the matter required careful consideration and consultations with representatives of the practices that would be covered by the draft convention, States might be willing to accept the possibility that domestic practices would be affected.

69. After discussion, the Working Group decided to proceed on the working assumption that the draft convention would harmonize and replace assignment-related practices existing under national laws. It was agreed that that assumption would need to be reconsidered at a future session in view of the specific contents of the provisions of the draft convention.

Paragraphs (4) and (5) (“Future receivable” and “Consumer receivable”)

70. The Working Group deferred discussion on paragraphs (4) and (5) until it had reviewed the provisions in the context of which the terms “future receivable” and “consumer receivable” were used (see paragraphs 94-99 and 234-238, below).

Paragraph (6) (“Writing”)

71. The substance of paragraph (6) was found to be generally acceptable. However, the Working Group noted that articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce adopted by the Commission at its twenty-ninth session (New York, 28 May to 14 June 1996), while not defining “writing” as such, provided for a functional electronic equivalent of “writing” and “signature”. The Secretariat was requested to align the definition of “writing” with those articles of the Model Law.

Paragraph (7)

72. The Working Group found the substance of paragraph (7) to be generally acceptable. In view of the fact that paragraph (7), which was intended to apply throughout the draft convention, did not establish a definition of the notion of “place of business” but rather dealt with the issue of multiple places of business, the Working Group agreed that paragraph (7) should be placed in draft article 1.

Article 3. International obligations of the [contracting] [enacting] State

73. The text of draft article 3 as considered by the Working Group was as follows:

“Variant A

“This Convention does not prevail over any international agreement which has been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the assignor and the debtor have their places of business in States parties to such agreement.

“Variant B

“The provisions of this Law apply subject to any agreement in force between this State and any other State or States.”
74. The Working Group noted that, while variant A, which was modelled on article 90 of the United Nations Sales Convention, would fit into a convention, variant B, which was inspired by the UNCITRAL Model Law on International Commercial Arbitration, would be suitable in a model law.

75. In view of its decision to proceed on the working assumption that the uniform law being prepared would take the form of convention, the Working Group decided that only the text of variant A, the substance of which was found to be generally acceptable, should be retained.

**Article 4. Principles of interpretation**

76. The text of draft article 4 as considered by the Working Group was as follows:

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

"(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based [or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law]]."

77. The Working Group noted that draft article 4, which was modelled on article 7 of the United Nations Sales Convention, addressed the issue of interpretation of the draft convention, and established a provision for dealing with matters not expressly settled in the draft convention (often referred to as a gap-filling provision).

80. The view was expressed that the discussion on whether paragraph (2) should be retained or deleted.

81. After discussion, the Working Group decided to retain paragraph (2), without square brackets.

82. The text of draft article 5 as considered by the Working Group was as follows:

"Variant A

"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.

"Variant B

"An assignment in a form other than in writing is not effective [towards third parties]."

83. Support was expressed in favour of both variant A and variant B. In favour of variant A, it was stated that an assignee's right in the assigned receivables should be independent from formalities. It was also stated that adopting no form requirement for the assignment would be consistent with the absence of specific form requirements under most national laws with respect to the original contract between the debtor and the assignor, and to the underlying financing contract between the assignor and the assignee. It was further stated that variant A was the only approach acceptable under the national laws of a number of countries where imposing specific form requirements for assignment transactions would be regarded as contrary to the general principles of contract law. As a matter of drafting, it was noted that variant A was modelled on article 11 of the United Nations Sales Convention. The view was expressed, however, that, while form requirements needed to be considered with respect to both the effectiveness and the evidence of the assignment, it might be inappropriate to deal with those two separate issues in a single provision.

84. Support was also expressed in favour of variant B, which provided that purely oral assignments would not produce effects towards any party or, alternatively, that such oral assignments would not produce effects towards third parties. In support of adopting a provision that would, in fact, result in a general prohibition of purely oral assignments, it was stated that such a prohibition, consistent with existing law in certain countries, was particularly needed in view of the decision of the Working Group to extend the scope of the draft convention to cover international assignments of domestic receivables. In order to achieve such a prohibition, it was suggested that the words "towards third parties" should be deleted. As a matter of drafting, it was suggested that the current wording of variant B might need to be reviewed to make it clear that a purely oral assignment could be rendered effective if it was subsequently put in writing.

85. In support of limiting the effectiveness of purely oral assignments to the context of the relationship between the assignor and the assignee, it was stated that a provision along those lines would preserve party autonomy, without adversely affecting the interests of third parties, i.e. creditors of the assignor or other persons to whom the assignor might have assigned the same receivables. In that connec-
tion, a question was raised as to whether the debtor should be regarded as a "third party" under draft article 5. It was recalled that the provisions of draft article 5 did not prejudice the interests of the debtor to the extent that the debtor would be entitled, before notification, to pay the assignor and be discharged. However, it was noted that the debtor was normally a third party to the assignment transaction and that it was described as a "third party" under paragraph (3) of draft article 2. It was generally felt that the text of variant B should be clarified in that respect. As a matter of drafting, it was suggested that the words "other than the debtor" should be added after the words "towards third parties".

86. The Working Group failed to achieve consensus as to which of the two variants should be adopted. It was generally felt that the discussion should be reopened in the context of future deliberations as to the time when an assignment became effective towards third parties. After discussion, the Working Group decided that the text of the two variants should be maintained in the revised draft to be prepared by the Secretariat for consideration at a future session.

**Article 6. Content of assignment**

87. The text of draft article 6 as considered by the Working Group was as follows:

"(1) Subject to the provisions of [this Convention] [this Law]:

(a) an assignment transfers to the assignee the right of the assignor to claim and to receive payment of the assigned receivables; and

(b) an assignment does not have any effect on the debtor's duty to pay other than to pay to the assignee.

(2) Without the debtor's consent, the assignment does not affect the obligations of the assignor arising from the original contract."

**Paragraph (1)**

88. It was generally felt that, as a result of the decisions made by the Working Group with respect to the definitions of "assignment" and "receivable" in draft article 2, paragraph (1)(a) had become superfluous and should be deleted.

89. The Working Group agreed that paragraph (1)(b) reflected a principle of paramount importance for the protection of the debtor, namely that the debtor's legal position should not be affected as a result of the assignment. In that connection, however, it was observed that the mere change in the identity of the creditor resulting from the assignment might cause a certain degree of inconvenience to the debtor. Examples were given of situations where, in view of the decision made by the Working Group to extend the scope of the draft convention to cover international assignments of domestic receivables, such inconvenience might result from the assignee being a foreigner to the debtor.

90. A number of observations and suggestions were made as to how that fundamental principle should be expressed and where it should be reflected in the draft convention. One observation was that the provision should clearly establish that the change in the identity of the creditor, in itself, should not be regarded as unduly affecting the position of the debtor. Another observation was that the provision should be redrafted, since paragraph (1)(b) might give the impression that the assignment itself triggered the obligation of the debtor to pay. With a view to avoiding such a possible misinterpretation, it was suggested that the words "subject to article 13" should be placed at the opening of the provision. Yet another observation was that the title of article 6 might not fully correspond to its contents, in particular since paragraph (1)(b) did not address the content of the assignment but the debtor's duty to pay. As to the location of the provision, it was suggested that the general principle of debtor protection should be expressed as one of the first provisions of the draft convention. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (1)(b), taking into account the observations and suggestions made, and to place it at an appropriate place in the draft convention.

**Paragraph (2)**

91. It was noted that paragraph (2), which attempted to clarify further the content of the assignment, was not intended to invalidate other types of assignment, e.g., novation of obligations or the assignment of a contract as a whole, which were outside the scope of the draft convention.

92. While the view was expressed that the general policy reflected in paragraph (2) was acceptable, it was generally felt that paragraph (2) was unnecessary in that it dealt not with the content of the assignment but with the original contract. In addition, it was stated that paragraph (2) might be inconsistent with the decision of the Working Group to cover assignments which did not involve an original contract. After discussion, the Working Group decided that paragraph (2) should be deleted.

**Article 7. Bulk assignment and assignment of single receivables**

93. The text of draft article 7 as considered by the Working Group was as follows:

"(1) One or more, existing or future, receivables may be assigned.

(2) An assignment of one or more, existing or future, receivables that are not specified individually transfers the receivables, if they can be identified as receivables to which the assignment relates, either at the time of assignment or when the receivables become due or are earned by performance.

(3) An assignment of future receivables transfers the receivables directly to the assignee, without the need for a new assignment."
Paragraph (4) of draft article 2 ("Future receivable")

94. Prior to discussing the text of draft article 7, the Working Group considered the definition of "future receivable", which had been reserved for future deliberation in the context of draft article 2 (see paragraph 70, above).

Subparagraph (a)

95. It was suggested that, consistent with the definition of "receivable" adopted under paragraph (3) of draft article 2, the definition of "future receivable" should cover non-contractual receivables alongside receivables arising from a contract. In that connection, a suggestion was made to combine the texts of subparagraphs (a) and (b) along the following lines: "future receivable means a receivable which may arise in the future pursuant to a contract existing at the time of the assignment or otherwise."

96. The discussion, however, focused on the main situation described under subparagraph (a), i.e. the case where a receivable, "while arising from a contract existing at the time of assignment", was "not due at the time of assignment". The view was expressed that such a situation did not address a "future receivable" but a receivable already in existence at the time of assignment, although payment was not due until a later time. It was widely felt that, in fact, such a situation was the one most commonly found in practice, where payment being due at a date posterior to that of the assignment was not normally regarded as characterizing a "future receivable".

97. After discussion, the Working Group decided that, as a matter of policy, receivables arising from contracts existing at the time of the assignment should not be considered as future receivables and, therefore, subparagraph (a) should be deleted.

Subparagraph (b)

98. A number of concerns were expressed with regard to subparagraph (b). One concern was that covering a receivable that "might" arise from a contract "expected" to be concluded at a later time resulted in a definition of "future receivable" that was too broad. Another concern was that the reference to a contract "expected" to be concluded was misleading, since it suggested the need to interpret the expectations of the various parties at the time of the assignment. It was observed that such expectations were irrelevant to the definition of a "future receivable", which should simply regard as "future" any receivable that might arise after the conclusion of the assignment. In order to address those concerns, the suggestion was made that "the definition of future receivable" should be redrafted along the following lines: "Future receivable means a receivable that might arise after the conclusion of the assignment."

99. After discussion, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (b) to reflect the various views and suggestions expressed.

100. Having completed its discussion of the definition of "future receivable", the Working Group reverted to draft article 7.

Paragraph (1)

101. The Working Group found the substance of paragraph (1) to be generally acceptable.

Paragraph (2)

"An assignment of one or more, existing or future, receivables that are not specified individually transfers the receivables, (…)"

102. The Working Group found the substance of the opening words of paragraph (2) to be generally acceptable.

"(…) if they can be identified as receivables to which the assignment relates, (…)"

103. The discussion focused on the question of whether and to what extent "conditional" or "hypothetical" receivables should be covered under draft article 7. It was recalled that, at the previous session of the Working Group, some doubts had been expressed as to whether the draft convention should recognize the entire range of future receivables. In addition, it was noted that bulk assignments of "conditional" receivables (i.e. receivables that might arise subject to a future event that might or might not take place) and "purely hypothetical" receivables might result in a business entity assigning all its "future" and "hypothetical" claims for the entire duration of its existence, a practice that might run counter to public policy in certain countries (see A/CN.9/420, paras. 53 and 54).

104. The view was expressed that hypothetical and conditional receivables should not be covered by the draft convention. It was observed that the validity of bulk assignments of hypothetical and conditional receivables was questioned under existing national laws in certain countries on several grounds, including that such assignments unduly restricted the economic autonomy of the assignor, or that they were unfair to creditors in the context of the insolvency of the assignor. However, a note of caution was struck about establishing a blanket exclusion of bulk assignments of hypothetical receivables. It was stated that in certain areas such as project financing, assignment of uncertain future claims was of considerable practical importance. For example, it was of great importance to recognize that project finance borrower building and operating a toll road might validly assign all future toll receipts in order to obtain financing needed for the project. With respect to that example, doubts were expressed as to whether such situations, where claims against toll-road users would arise and payment would be made simultaneously, should be identified as assignments of future receivables or would be better described as assignments of future cash flows or payment streams. It was suggested that paragraph (2) should make it clear that the assignment of future cash flows was also covered by the draft convention.

105. After discussion, the Working Group agreed that the criterion used in paragraph (2), i.e. that the receivables should be "identified as receivables to which the assignment relates", provided appropriate recognition of the economic need to allow bulk assignments of various types of
future receivables on the one hand, and the need to protect the parties against the risks that might result from unlimited freedom to assign all conceivable future receivables on the other hand.

106. A question was raised as to whether assignments of future receivables should be validated only if they were made for consideration, i.e., if assignments made as gifts should also be covered. It was widely felt that mere gifts between individuals should be excluded from the scope of the draft convention. In that connection, a view was expressed that issues such as a possible limitation in the scope of the draft convention to cover only assignments made for financing purposes, and a possible exclusion of consumer transactions from the scope of the draft convention, might need to be reconsidered at a later stage. It was also felt, however, that, should the issue of assignments made as gifts be dealt with by way of exclusion in draft article 1 or elsewhere in the text, attention should be given to avoid inadvertently excluding certain kinds of assignments that should be covered by the draft convention, although they were not made for monetary consideration. Examples given in that respect included, assignments made in the context of transactions between subsidiaries and parent companies, or in the context of “intra-group” transactions. It was suggested that, when drafting such possible exclusions, wording such as “assignment for value” might be considered with a view to covering cases where the consideration or “counter-weight” of the assignment might not be monetary but consist, for example, of a commitment, guarantee or other undertaking.

“(. . .) either at the time of assignment or when the receivables become due or are earned by performance”

107. It was noted that, under paragraph (2), the only condition of validity of the transfer was that the receivables could be identified as related to the assignment, either at the time of assignment or when they came into existence. Various views were expressed as to the time when the receivables should be “identified” as relating to the assignment. One view was that the time as of which future receivables should be identified should be left to the parties’ discretion, as was currently the case under paragraph (2). In that connection, it was suggested that the time when the receivable arose should be added to the time of assignment and the time when the receivable became due in paragraph (2). Another view was that a future receivable should be identified at the time of the assignment. Yet another view was that no specific receivable had to be identified at the time of the assignment, as long as the category to which such a receivable belonged was identified sufficiently, when the receivable came into existence.

108. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (2), including possible variants reflecting the various decisions and suggestions made.

**Paragraph (3)**

109. It was generally felt that, if paragraph (2) dealt with the time when receivables should be identified, paragraph (3) should deal with the time when the assigned receivables were transferred. Various views were expressed as to the specific point in time when the transfer of future receivables should be effected. One view was that the transfer should take place at the time when the future receivables arose. It was suggested that the words “when they arise” should be added at the end of paragraph (3). In support of that view, it was stated that, in the context of future receivables, it might be more appropriate for rights to be transferred only as of the time when they came into existence.

110. Another view was that the future receivables should be transferred as of the time of the assignment. In support of that view, it was stated that, for example, future receivables assigned prior to the beginning of a suspect period in the context of insolvency proceedings should not be treated differently whether the receivables arose before or during the suspect period.

111. A question was raised as to whether the transfer of the assigned receivables would be valid as against third parties or whether it would be effective only as between the assignor and the assignee. It was widely felt that the transfer should be effective at the same time against parties to the assignment and against the debtor and other third parties. However, it was pointed out that paragraph (3) should make it clear that it was not intended to affect the rights of third parties, in particular in case of insolvency of the assignor. While the Working Group generally agreed that the draft convention should not unduly interfere with the law of insolvency, it felt that the issue might need to be discussed further in the context of draft article 18 (see paragraphs 254-258, below). It was generally agreed that wording along the lines of “without prejudice to the provision on priorities” might be added at the beginning of paragraph (3).

112. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (3), including possible variants reflecting the various decisions and suggestions made.

**Article 8. No-assignment clauses**

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

“(1) “Variant A

“An agreement transfers the receivables to the assignee notwithstanding any agreement between the assignor and the debtor prohibiting or restricting such assignment. Nothing in this article affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of a no-assignment clause, but the assignee is not liable to the debtor for such a breach.

“Variant B

“An agreement between the assignor and the debtor prohibiting or restricting assignment of receivables is invalid. An assignment transfers the receivables to the
assignee notwithstanding such an agreement. Neither the assignor nor the assignee shall have any liability for breach of such an agreement.

"[2] This article does not apply to the assignment of consumer receivables."

Paragraph (1)

114. The Working Group noted that draft article 8 was aimed at covering contractual but not statutory prohibitions of assignment. In addition, it was noted that variant A was aimed at: providing certainty as to the validity of an assignment made in breach of a no-assignment clause; and at ensuring that, while the debtor might recover from the assignor any damage suffered as a result of the assignment, that remedy would not be available against the assignee, since otherwise the assignment could be deprived of any value. Moreover, it was noted that variant B, which was inspired by article 9-318(4) of the United States Uniform Commercial Code (UCC), took a more radical approach in that it invalidated a no-assignment clause with the result that an assignment effected in breach of a no-assignment clause would be valid, while the violation of that clause would not give rise to any liability.

115. The Working Group exchanged views as to whether draft article 8 should be retained. One view was that draft article 8 should be deleted altogether, since anti-assignment and similar clauses agreed upon by creditors and debtors were a matter of contract (i.e. the original contract), and should not be dealt with in the draft convention. In addition, it was pointed out that draft article 8 failed to address other contractual clauses, which, while falling short of being anti-assignment clauses in a narrow sense, could result in prohibiting assignments (e.g. confidentiality clauses). The prevailing view, however, was that draft article 8 should be retained, since anti-assignment clauses were often included in contracts and posed an obstacle to receivables financing in that they created uncertainty as to the validity of the assignment, thus increasing the cost of credit. As to confidentiality clauses, it was generally felt that potential conspiracies between assignors and assignees to violate such clauses contained in agreements between assignors and debtors should remain outside the scope of draft article 8.

116. Having decided to retain draft article 8, the Working Group turned to variants A and B. The discussion focused on variant A, since it was generally felt that, while variant B might provide more certainty, it interfered excessively with party autonomy, by tilting the balance of interests in favour of the assignee.

117. The validity of assignments made in violation of anti-assignment clauses was found to be generally acceptable, despite the fact that, under some national laws, such assignments were considered as being invalid. At the same time, however, it was recognized that some exceptions would need to be made to the rule contained in variant A, in order to uphold anti-assignment clauses in certain special cases, e.g. in case of contracts with Governments or in syndicated credit agreements. In that connection, it was observed that in such cases an assignment might not be invalid as between the assignor and the assignee, as long as no obligation was created for the debtor thereby.

118. As to the liability of the assignee towards the debtor for violation of an anti-assignment clause agreed upon between the assignor and the debtor, which was excluded under variant A, differing views were expressed. One view was that releasing the assignee from liability towards the debtor might result in the debtor not paying the assignee, while being unable to recover from the assignor damages suffered by the debtor as a result of the assignment. Such a situation might arise, for example, if the assignor had, in the meantime, become insolvent. In addition, it was pointed out that such an approach might unduly restrict the autonomy of the parties to agree that certain receivables arising between them were not assignable, and would, in addition, be inconsistent with the approach taken in a number of national legal systems.

119. The prevailing view, however, was that extending the liability of the assignor for violating an anti-assignment clause, to the assignee would result in assignees having to examine a large number of contracts in order to ascertain whether they included anti-assignment clauses or not. In addition, it was stated that such an approach would result in receivables arising from contracts that contained anti-assignment clauses being rejected or accepted by assignees at a substantially reduced price, which would adversely impact on the amount of credit available to assignors and debtors.

120. In order to counterbalance the validity of an assignment made in violation of an anti-assignment clause and the absence of liability of the assignee, on the one hand, with the need to protect the debtor, on the other hand, a number of suggestions were made. One suggestion was that the debtor should be able to discharge its obligation by paying the assignor. It was noted that article 16 of the Code of International Factoring Customs promulgated by Factors Chain International followed a similar approach, in that the assignor was allowed to receive payments as an agent of the assignee. However, it was observed that, while such an approach could be acceptable within a group of financing institutions subscribing to the same code of conduct, it could not find general application, since it could defeat the ability of the assignee to rely on the assigned receivables.

121. Another suggestion was that knowledge on the part of the assignee of the existence of an anti-assignment clause (e.g. a negative pledge) should be made a condition of the validity of assignments made in violation of anti-assignment clauses or, at least, that such knowledge should entitle the debtor to discharge its obligation by paying the assignor. The suggestion to "penalize" the assignee for accepting an assignment in violation of a known anti-assignment clause was opposed on the ground that it would inadvertently result in encouraging the assignee to avoid a due-diligence test, since, if the assignee was diligent, it would find out that an anti-assignment clause existed, and would not accept the receivables, or would accept them at a substantially reduced value. In addition, it was pointed out that, while making business practice conform to somehow higher good faith standards was an important goal,
that should not be made at the expense of certainty, which would be the case if knowledge of the assignment on the part of the assignee would invalidate the assignment or deprive the assignee of the right to collect.

122. After discussion, the Working Group decided that variant A should be retained unchanged.

**Paragraph (2)**

123. It was noted that paragraph (2), which appeared within square brackets pending determination of the approach to be followed by the Working Group with regard to consumer protection, was intended to leave the validity and effectiveness of anti-assignment clauses contained in consumer contracts outside the scope of draft article 8. In addition, it was noted that an alternative approach might be to cover anti-assignment clauses in a consumer context, subject to the applicable consumer protection law, and to strengthen that protection, for example by providing that, in a consumer context, unless the parties agreed otherwise, payment of the assigned receivables should always be made to the bank account designated by the assignor and the debtor (draft article 19).

124. The view was expressed that, while the principle of consumer protection embodied in paragraph (2) was an important principle, paragraph (2) created a number of concerns, including that it was based on the assumption that consumers had a power to negotiate and to include anti-assignment clauses in their contracts, which might not be realistic, and that in practice it was very difficult to distinguish which receivables in a pool of receivables assigned were or were not owed by consumers. In order to address those concerns, the suggestion was made that an approach along the lines of article 1.2(a) of the Factoring Convention should be followed. It was noted that the Factoring Convention did not apply to receivables arising from contracts of sale of goods if the goods were bought for personal, family or household use. That suggestion was opposed on the ground that such an approach would not improve the position of consumer-debtors, since, while it would not increase their negotiating power, it would fail to increase the availability of lower cost credit. In addition, it was noted that following the approach taken in the Factoring Convention would be inappropriate, since the Factoring Convention was not intended to cover securitization transactions, in the context of which credit was raised at a lower cost in financial markets through the sale of securities backed, e.g. by large numbers of small-amount consumer receivables.

125. Another suggestion made in order to address the above-mentioned concerns was that in a consumer context, the debtor-consumer should be allowed to discharge its obligation by paying the assignor. In support of that suggestion, it was pointed out that such an approach would protect the debtor from uncertainty as to whom to pay or from having to deal with a new, possibly foreign, creditor, without negatively impacting on securitization transactions, in which payment to the assignor was normal practice. That suggestion too was objected to on the grounds that it could negatively affect a number of practices in which, in return for the assigned receivables, the assignee provided not financing but related services, including collection and accounting services. However, it was agreed that payment to a bank account or post-office box, in particular in a consumer context, should be further considered in the context of draft article 19. As a matter of drafting, it was suggested that the reference to “consumer receivables” might be usefully clarified to indicate that it was intended to cover receivables owed by consumers.

126. After discussion, the Working Group decided to delete paragraph (2). It was agreed that the issue of consumer protection and the definition of “consumer receivable” would need to be further discussed in the context of draft article 19.

**Article 9. Transfer of security rights**

127. The text of draft article 9 as considered by the Working Group was as follows:

“Unless otherwise provided by a rule of law or by an agreement between the assignor and the assignee, an assignment transfers to the assignee the rights securing the assigned receivables without a new act of transfer.”

128. It was noted that draft article 9 reflected the principle of automatic transfer of security rights, subject to a contrary statutory or contractual provision, which had been broadly supported at the previous session of the Working Group (A/ CN.9/420, para. 74).

129. It was generally felt that draft article 9 should cover both personal (e.g. guarantees) and proprietary security rights (e.g. pledges, mortgages). As a matter of drafting, the suggestion was made that the reference to “rule of law” should be aligned with the relevant wording contained in articles 6, 7, 8 and 10 of the UNCITRAL Model Law on Electronic Commerce. Support was expressed in favour of allowing parties to exclude the automatic transfer of rights securing the assigned receivables. The example of a mortgage securing the assigned receivables was mentioned, in which case the assignee might have an interest in excluding by agreement the automatic transfer of the mortgage, since real estate property rights involved costs and risks (e.g. maintenance, taxation, insurance).

130. After discussion, the Working Group found the substance of draft article 9 to be generally acceptable, and requested the Secretariat to prepare a revised draft, taking into account the suggestions made.

**Chapter III. Rights, obligations and defences**

**Article 10. Determination of rights and obligations**

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

“[1(1) The rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules, general conditions or usages
specifically referred to therein, and by the provisions of [this Convention] [this Law].

"(2) The rights and obligations of the assignor and the debtor arising from the original contract are determined by the terms and conditions set forth in that contract, including any rules, general conditions or usages specifically referred to therein, and by the provisions of [this Convention] [this Law].

"(3) The priority between several assignees who obtained the receivables from the same assignor, as well as between the assignee and creditors of the assignor including, but not limited to, the administrator in the insolvency of the assignor, is determined, subject to the provisions applicable to the insolvency of the assignor, by the provisions of [this Convention] [this Law].

"(4) In interpreting the terms and conditions of the assignment, the underlying financing contract, if any, and the original contract and in settling questions that are not addressed by their terms and conditions or by the provisions of [this Convention] [this Law], regard shall be had to generally accepted international rules and usages of receivables financing practice."

132. It was noted that draft article 10, which was a new provision, modelled on article 13 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, and appeared within square brackets, was intended to clarify the relationship between the draft convention, other rules of law and party autonomy.

**Paragraph (1)**

133. The Working Group noted that paragraph (1) recognized party autonomy with regard to the rights and obligations of the assignor and the assignee. The concern was expressed that, while a provision along the lines of paragraph (1) was appropriate for standardized contractual relations such as those addressed in the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, it might cause uncertainty in the context of assignment, which involved a great variety of contractual relationships.

134. A number of observations and suggestions were made as to the exact formulation of the principle embodied in paragraph (1). One observation was that paragraph (1) should distinguish between the rights and obligations of the assignor and the assignee arising from their contractual relationship and those arising from the provisions of the draft convention. It was suggested that, in case of conflict between those two sources of rights and obligations, the provisions of the draft convention should prevail. Another observation was that paragraph (1) unnecessarily derogated from the normal rule of contract interpretation that lacunae in contracts could be filled by reference to trade usages, even if they were not "specifically" referred to in the contract. It was stated that the situation might be different in the case of independent bank guarantees and stand-by letters of credit, where the reference to trade usages was relevant to the determination of the extent of the commitment accepted in the undertaking and had, therefore, to be specific. Accordingly, it was suggested that the word "specifically" be deleted.

135. Yet another observation was that paragraph (1) did not make it sufficiently clear that the rights and obligations of the assignor and the debtor were to be determined by reference to the applicable law, which would include the draft convention, if the conditions for its application were met.

136. After deliberation, the Working Group decided to retain paragraph (1) within brackets and requested the Secretariat to prepare a revised draft, taking into account the observations and suggestions made.

**Paragraph (2)**

137. The Working Group agreed that paragraph (2) should be deleted. Several reasons were cited in support of deletion, including: that paragraph (2) dealt with the assignor-debtor relationship, which was outside the scope of the draft convention; that it was not possible to cover in one provision all the possible sources of receivables, some of which were already covered by existing rules of contract interpretation (e.g. the United Nations Sales Convention); and that, in view of the decision of the Working Group to cover international assignments of domestic receivables, paragraph (2) might result in different laws being applicable to the assignor-debtor relationship, depending on whether the assignment was to a foreign or to a domestic assignee.

**Paragraph (3)**

138. While the Working Group was in agreement with the principle embodied in paragraph (3), doubts were expressed as to its placement in the context of draft article 10. The view was widely shared that paragraph (3) addressed an issue of paramount importance, i.e. the relationship between the draft convention and the rules applicable to the insolvency of the assignor. It was observed that recognizing the validity of bulk assignments of future receivables as concerns the administrator in the insolvency of the assignor should be one of the main goals of the text being prepared. Noting that the issue was addressed in the context of draft article 18, the Working Group decided to defer its discussion on the matter until it had completed its consideration of draft article 18.

139. The suggestion was made that, in order to facilitate the consideration of the relationship between the draft convention and the rules applicable in case of insolvency by the Working Group, the Secretariat should prepare a list of questions that might need to be addressed. In that connection, it was observed that certain assignment-related issues might be addressed by rules of the law applicable to insolvency and that the Hague Conference intended to prepare a paper on conflict-of-laws issues on assignment, which would also address conflict-of-laws issues relating to insolvency.

140. The Working Group decided to retain paragraph (3) within brackets, pending discussion of draft article 18, and
Paragraph (4)

141. It was widely felt that paragraph (4) embodied an extremely important principle, namely the need to take into account the commercial finance context in the interpretation of assignment. However, the concern was expressed that referring, for the purpose of interpretation of the assignment, to a body of trade usages that did not exist or was not generally recognized could introduce uncertainty.

142. The Working Group exchanged views as to the relationship between paragraph (4) and draft article 4(2). One view was that the two provisions were dealing with the same issue and that paragraph (4) should be deleted. Another view was that the two provisions addressed two distinct issues, paragraph (4) gap-filling in the assignment and draft article 4(2) gap-filling in the draft convention. It was thus suggested that both provisions should be retained. Yet another view was that, while paragraph (4) and draft article 4(2) were intended to address different issues, there was potential for overlap between the two provisions in certain cases. The example was given of the case in which both the draft convention and the assignment left an issue unsettled. As was pointed out, under draft article 4(2) that issue would have to be settled by reference to the general principles underlying the draft convention and, in the absence of such principles, by reference to the conflict-of-laws rules. At the same time, under paragraph (4), the same matter would be settled by reference to "generally accepted international rules and usages". It was, therefore, suggested that paragraph (4) should be aligned with draft article 4(2).

143. As a matter of drafting, it was suggested that the reference to the underlying and the original contract should be deleted, since those contracts fell outside the scope of application of the draft convention.

144. After deliberation, the Working Group decided to retain paragraph (4) and requested the Secretariat to prepare a revised draft, taking into account the suggestions made.

Article 11. Warranties of the assignor

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

"(1) Unless otherwise explicitly agreed between the assignor and the assignee, the assignor represents that the assignor is, at the time of assignment, or will later be, the creditor, and that the debtor does not have, at the time of assignment, defences that would deprive the assigned receivables of value.

"(2) Unless otherwise explicitly agreed between the assignor and the assignee, the assignor does not represent that the debtor will perform its payment obligation under the original contract."

146. The Working Group first considered the question whether draft article 11 should be retained. In support of deletion, it was stated that undertakings between the assignor and the assignee were a matter of contract and should be left to be settled by the parties. The prevailing view, however, was that article 11 was useful and should be retained. In support of retention, it was observed that, while the types of warranties given by the assignor to the assignee were a matter of contract, it was useful to include a default rule addressing the question of warranties in the absence of a relevant provision in the assignment.

Title

147. The suggestion was made that, for consistency in terminology with the text of draft article 11, terms such as "representations" or "undertakings" should be used in the title instead of the term "warranties".

Paragraph (1)

148. The Working Group noted that paragraph (1), which merged paragraphs (1) and (2) of the earlier draft, was intended to recognize party autonomy in the allocation of risks between the assignor and the assignee for defences of the debtor that were unknown to the assignee and, at the same time, to allocate that risk in the absence of agreement by the parties.

149. The view was expressed that the representations referred to in paragraph (1) fell into two categories, namely, representations as to the ownership in the receivables and representations as to the existence of defences of the debtor under the original contract between the assignor and the debtor. While the first category of representations was found to be generally acceptable, possibly subject to limitation of its scope to cases of fraud, the second category was said to raise a number of concerns. One concern was that it could be construed more widely than intended and, in particular, as requiring the assignors to promise to assignees that the contracts from which future receivables would arise would be valid and enforceable. Another concern was that manufacturers-assignors were said to be reluctant in practice to promise, for example, that the products they manufactured were free from defects that could give rise to defences on the part of buyers-debtors. Such a warranty would thus either be unnecessary and parties would exclude it by agreement, or insufficient and parties would need to further develop it into a more sophisticated one. Yet another concern was that, in its present formulation, paragraph (1) could inadvertently result in allowing the parties to exclude liability of the assignor for hidden defences that deprived the receivables of any value, which was said to be inappropriate. In order to address those concerns, the suggestion was made to delete from paragraph (1) the warranty as to defences of the debtor.

150. However, support was expressed for retaining that warranty. It was observed that the warranty would take effect only if the parties had not dealt in their agreement with the issue of allocation of the risk for unknown defences of the debtor. In addition, it was stated that the allocation of that risk in paragraph (1) was a reasonable one,
since it was within the control of the assignor to perform the original contract well and to avoid giving rise to defences of the debtor, and since, in any case, the assignor was in a better position to know whether the debtor had any defences. In that connection, it was pointed out that an implied warranty as to defences of the debtor would result in a greater degree of accountability of the assignor for performing its contract with the debtor. Such an approach was said to be particularly useful, for example, in the context of contracts for the sale of goods in which service and maintenance elements were to be included. It was pointed out that, if the seller-assignor left the goods to deteriorate, that conduct would give rise to defences on the part of the debtor, and the assignee would not be able to do anything to prevent that result. In view of the above, it was stated that a risk-allocation along the lines of paragraph (1) would facilitate receivables financing, since it would provide more certainty as to whether the assignee would be able to collect from the debtor.

151. As to the question whether the warranty in paragraph (1) needed to be explicit or could also be implied, it was recalled that, at the previous session of the Working Group, the concern had been expressed that the assignor and the assignee should not be allowed to vary the content of the warranty as to the existence of the receivables, which flowed from the basic obligation to act in good faith, or that, at least, the warranty could be varied only by way of an explicit agreement between the assignor and the assignee (A/CN.9/420, para. 83). It was also recalled that the right of the parties to exclude, implicitly or explicitly, the warranty as to defences of the debtor had been cited as one of the reasons in favour of the suggestion to delete that warranty (see paragraph 149, above).

152. It was suggested, however, that the reference to an explicit agreement of the parties should be deleted. In support of that suggestion, it was noted that the warranty contained in paragraph (1) was a matter of contract and the parties should be free to deal with that matter, explicitly or implicitly. In addition, it was noted that an explicit agreement would be necessary only if the debtor and third parties were to be affected, which was not the case with the warranty provided for in paragraph (1).

153. As to the formulation of paragraph (1), several suggestions were made. One suggestion was that it should be made clear that the term “defences” also covered counter-claims and set-offs. Another suggestion was that paragraph (1) should be revised to make clear that it referred to defences that could defeat, in whole or in part, the right of the assignee to collect.

154. With regard to the question whether a fundamental breach of warranties by the assignor would result in the automatic avoidance of the assignment and in the automatic transfer of the receivables back to the assignor, without a new act of transfer, the Working Group agreed that that was a matter involving remedies for breach of contract, which should be left to the applicable domestic law.

155. After discussion, the Working Group decided that the word “explicitly” should be deleted, that the warranty as to the defences of the debtor should be placed within square brackets and that the reference to the value of the receivables should be redrafted with a view to clarifying its meaning.

**Paragraph (2)**

156. The suggestion was made that paragraph (2) should be revised so as to provide that, apart from the warranty in paragraph (1), there were no other warranties between the assignor and the assignee. That suggestion was objected to on the ground that there might be other sources of obligations between the parties, beyond their agreement and paragraph (1), e.g. trade usages referred to in draft article 10(4). In addition, the suggestion was made that, although requiring an explicit agreement for a warranty as to the solvency of the debtor was more justified than requiring such an explicit agreement for the exclusion of the warranty in paragraph (1), on balance, it would be better to delete the word “explicitly” and leave the matter to the rules on contract interpretation. Moreover, it was suggested that, for the same reasons cited in the discussion of paragraph (1), paragraph (2) should also be placed within brackets.

157. As a matter of drafting, it was suggested that, in line with the decision of the Working Group to cover the assignment of non-contractual receivables, the reference to the original contract should be deleted.

158. After discussion, the Working Group found the substance of paragraph (2) to be generally acceptable and decided that the reference to an “explicit” agreement and to the original contract should be deleted.

**Article 12. Assignee’s right to notify the debtor and to receive payment**

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

“(1) Unless otherwise provided in the agreement between the assignor and the assignee, the assignee is entitled to notify the debtor pursuant to article 13 and to request payment of the receivables assigned at the time agreed upon with the assignor and, in the absence of such an agreement, at any time.

“(2) If the assignor fails to perform its obligation to pay under the financing contract, the assignee is entitled to notify the debtor and to request payment.

“(3) If agreed by the assignor and the assignee or required by law:

“(a) The assignee who receives payment from the debtor must account for any amount received in excess of the obligation secured by the assignment; and

“(b) The assignor remains liable for any amount by which the payment received by the assignee from the debtor falls short of the obligation secured by the assignment.”
Paragraph (1)

160. It was noted that under paragraph (1), the assignee was allowed to notify the debtor and to request payment at any time, unless otherwise agreed between the assignor and the assignee. Some doubt was expressed as to whether it was appropriate to provide that the right of the assignee to notify the debtor might be restricted by agreement. However, it was generally felt that restrictions to the right of the assignee to notify the debtor and to request payment were a matter of contract to be negotiated between assignors and assignees.

161. A number of suggestions of a drafting nature were made, including: that for consistency with the text of paragraph (1), the title of draft article 12 should be revised along the following lines: “Assignee's right to notify and to request payment”; and that paragraph (1) should end with the words “receivables assigned”, while the remaining words could be deleted, the meaning of the rule contained in paragraph (1) remaining unchanged.

162. After discussion, the Working Group found the substance of paragraph (1) to be generally acceptable, subject to the suggested drafting modifications.

Paragraph (2)

163. The Working Group agreed to delete paragraph (2). It was generally felt that the right of the assignee to notify the debtor and to request payment should not be restricted along the lines suggested in paragraph (2), and that it should, in any case, be subject to agreement between the assignor and the assignee.

Paragraph (3)

164. Doubts were expressed as to the usefulness of paragraph (3). It was stated that paragraph (3), as currently drafted, did not add anything new to what could be agreed by the parties or provided by existing law. It was observed that, even if the opening words of paragraph (3) were rephrased to read “unless otherwise provided by agreement or by law”, paragraph (3) would not serve a useful purpose, since the type of assignment involved in each particular case would depend on the agreement of the parties and no attempt should be made to solve that question by way of a general default rule. After consideration, the Working Group decided to delete paragraph (3).

Article 13. Debtor’s duty to pay

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

“(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:

“(a) the debtor receives notification in writing of the assignment by the assignor or by the assignee;

“(b) the notification contains an unequivocal request for payment and reasonably identifies the receivables assigned, whether existing or future at the time of notification, and the person to whom or for whose account the debtor is required to make payment; and

“(c) the debtor has not received notification in writing of a prior assignment, or of measures aimed at attaching the assigned receivables, including but not limited to judgements or orders issued by judicial or non-judicial bodies, as well as of measures effected by operation of law, in particular in case of insolvency of the assignor.

“(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) In case the debtor receives notifications of more than one assignment of the same receivables made by the same assignor, the debtor is discharged from liability by payment to the first assignee to notify in accordance with paragraph (2) of this article and has against the assignee the defences provided for under article 14.

“(5) Irrespective of any other ground on which payment by the debtor to the assignee discharges the debtor from liability, payment by the debtor to the assignee discharges the debtor from liability if made in accordance with this article.”

Paragraph (1)

166. It was noted that under paragraph (1) the debtor, before receiving notification as provided by paragraph (2), had the right to pay the assignor as required by the original contract and be discharged of its obligations under that contract. At the same time, it was noted, the debtor could pay the assignee, bearing the risk, however, that it might have to pay twice if it subsequently turned out that the assignee was not the rightful creditor. In such a case, it was observed, the debtor would have a particular interest in making use of the right recognized under paragraph (3) to request adequate proof of the assignment. It was also observed that the provisions of the applicable law relating to fraud and the principle expressed in draft article 4 that good faith should be observed in international trade were implicit limitations of the right of the debtor to discharge its obligation by paying the assignor before notification.

167. While some doubt was expressed as to the usefulness of retaining paragraph (1), the prevailing view was that paragraph (1) was necessary in order to provide a clear discharge rule for the debtor paying the assignor before notification. The Working Group exchanged views as to whether knowledge of an assignment should have the same result as notification, namely to preclude the debtor from discharging its obligation by paying the assignor.

168. One view was that mere “knowledge” of an assignment on the part of the debtor should be recognized as an alternative way of triggering the debtor’s obligation to pay
the assignee. In support of that view, it was argued that it
would run counter to good faith to allow the debtor to pay
the assignor in cases where the debtor actually knew of the
assignment, e.g. by way of oral notification. The suggestion
was made that, if knowledge of an assignment were not to
be treated in the same way as notification, paragraph (1)
should, at best, be revised so as to ensure that only the
notification of a valid assignment could preclude the debtor
from discharging its obligation by paying the assignor.

169. Another view was that the duty of the debtor to pay
the assignee should be triggered only by notification of the
assignment. It was stated that a notification approach was
essential for the protection of the debtor, which was the
main purpose of draft article 13, in particular in order to
ensure that there would be no doubt as to whom the debtor
should pay in order to obtain discharge. In that connection,
it was observed that such an approach was in line with a
principle of paramount importance for the protection of the
debtor, and explicitly embodied in draft article 6(1)(b), i.e.
that the legal position of the debtor should not be changed
as a result of the assignment.

170. In addition, it was stated that a rule along the lines
of paragraph (1) reflected what should be regarded as pro­
per behaviour of the debtor before notification. It was also
stated that such a rule was in line with normal business
practice, even if the debtor had received an oral notification
or had actual knowledge of the assignment. It was recalled
that, in practice, parties often intended the debtor to con­
tinue making payments to the assignor until, or even after,
notification was given. The example was given of securit­
zation transactions in which it was customary for the debtor
to have knowledge or notification of the assignment but to
continue making payments to the assignor, since the as­
signee was a special corporation established for the sole
purpose of issuing and selling securities, without being
equipped with a structure geared to receiving payments of
the assigned receivables.

171. Moreover, it was stated that, while making business
practice conform to good faith standards was an important
goal, this should not be at the expense of certainty, which
would be the case if mere knowledge of the assignment
were to trigger the debtor's duty to pay the assignee. In that
regard, it was noted that a number of questions would need
to be addressed, including what constituted knowledge,
who had to prove knowledge, what the content of knowl­
edge had to be and how knowledge of the assignment
should be treated in case of several conflicting assignments.

172. As a matter of drafting, the suggestion was made
that paragraph (1) should refer to payment by the debtor
under the terms and conditions of the original contract. The
suggestion was also made that, in order to cover non-con­
tractual receivables, a reference should be added in para­
graph (1) to their source as well.

Paragraph (2)

Chapeau

173. Concerns were expressed as to both the substance
and the formulation of the chapeau. As to the substance,
one concern was that the debtor's duty to pay was not only
subject to notification, but was mainly subject to the orig­i
nal contract and to the absence of defences and set-offs set
forth in draft article 14. As to the formulation, the concern
was that the chapeau might be misread as making notifi­
cation a condition of validity of the assignment and the
debtor's duty to pay. Another concern was that requiring
payment to be made to the assignee could preclude parties
from agreeing that payment should be made to the assignor
or to a third party.

174. In order to address those concerns, a suggestion was
made that the chapeau should be recast to limit the scope
of paragraph (2) to cases where a "valid" notice of assign­
ment had been received. Under that suggestion, subparagraphs (a) and (b) should be regarded as stating the mini­
mum requirements for a valid notice, and the location of
subparagraph (c) should be reconsidered. Broad support
was expressed in favour of that suggestion. An additional
suggestion, which did not attract sufficient support, was
that the debtor should be provided with the possibility of
seeking the guidance of the competent court in those cases
where it might be faced with conflicting allegations of as­
signors and assignees or other parties (see paragraphs 199­
201, below).

Subparagraph (a)

175. The Working Group found the substance of sub­
paragraph (a) to be generally acceptable. The concern was
expressed, however, that, should the assignee be allowed to
notify the debtor independently of the assignor, the debtor
might be burdened with the need to request additional
proof, or with the risk of misjudging the facts (e.g. as to
the existence of a valid assignment) and having to pay
twice. The concern was also expressed that, in certain
cases, even allowing the assignor to notify independently
of the assignee might be inappropriate. The example was
given of a case where the assignor, in violation of an
arrangement with the assignee that payment should con­
tinue to be made to the assignor, notified the debtor and
requested that payment should be made to the assignee.
In response to that concern, it was observed that, in the case
mentioned, it was important that the debtor should be able
to discharge its obligation as directed by the assignor, and
should not be concerned with the private arrangements that
might exist between the assignor and the assignee.

Subparagraph (b)

176. It was generally felt that a notification should con­
tain information about the assignment, the assigned receiv­
able and the identity of the assignee. It was also felt that
requiring, in addition, that the notification contain an une­
quivocal request for payment was unnecessary. As an alter­
native, it was suggested that consideration might be given
to requiring that the notification include payment instruc­
tions. That suggestion was opposed on the ground that
matters such as place, time and method of payment were
better left to the contract between the assignor and the as­
signee and to otherwise applicable law.
177. The Working Group agreed in principle that notification of an assignment could relate to future receivables. The suggestion was made, however, that the validity of a notification relating to future receivables should not be unlimited in time. The Working Group also agreed that the notification should identify the person to whom the debtor should pay. In that connection, a concern was expressed that such a rule could have an impact on the law applicable to the debtor’s obligation and on court jurisdiction. If the new creditor identified in the notification was a person located in a country other than the country of the debtor, the draft convention would apply and not the domestic law of the debtor’s country or the otherwise applicable law. In response, it was observed that that concern was addressed by a number of provisions in the draft convention, which were aimed at ensuring that the debtor’s legal position would not be negatively affected as a result of the assignment (e.g. draft articles 6 (1)(b), 13, 14, 17(2) and 19).

Subparagraph (c)

178. There was broad support in the Working Group for the principle embodied in subparagraph (c) that written notification of a prior assignment or orders of judicial or non-judicial bodies with respect to the assigned receivables should preclude the debtor from discharging its obligation by payment to the assignee giving notification. However, it was generally felt that subparagraph (c) would no longer fit into paragraph (2) if the paragraph was revised to focus on the requirements of a valid notice, rather than on the debtor’s duty to pay. It was agreed that a provision along the lines of subparagraph (c) should be placed elsewhere in the text.

179. Based on the suggestions made and concerns expressed with respect to paragraphs (1) and (2) of draft article 13, a proposal was made for a revised version of draft article 13, which read as follows:

“(1) Unless and until the debtor has received a valid notice of assignment, the debtor shall be entitled to a valid discharge of its obligation by payment to the assignor.

“(2) A valid notice of assignment shall:

“(a) be in writing, stating that the assignment has taken place;

“(b) be signed by either the assignor or the assignee;

“(c) identify sufficiently [in an appropriate manner] the receivables which have been assigned; and

“(d) specify any relevant requirements for how payment is to be made.

“(3) Upon receipt of a valid notice of assignment, the debtor shall thenceforth owe its assigned obligations to the assignee, subject to paragraph (4) below and to article 14.

“(4) Nothing herein shall affect any obligation which may be imposed on the debtor by any court order in relation to its payment obligations or the right of the debtor to seek directions with respect thereto from any court having jurisdiction.”

180. The Working Group decided to continue its discussion of paragraphs (1) and (2) of draft article 13 on the basis of the proposed text.

New paragraph (1)

181. It was generally agreed that new paragraph (1), which changed the focus of draft article 13 from the debtor’s duty to pay to the discharge of the debtor, was an improvement over the previous draft. However, a number of concerns were expressed as to the exact formulation of new paragraph (1). One concern was that it might affect the obligation of the debtor to pay under the original contract, in that it could be misread as implying, for example, that the debtor could choose to pay upon notification, even before payment became due under the contract. In order to address that concern, a number of suggestions were made, including: that the debtor’s entitlement to a discharge should be made subject to the terms and conditions of the contract; and that a phrase should be added at the end of new paragraph (1) along the lines ‘in the same manner and time as if assignment had not taken place’.

182. Another concern was that the reference to a “valid notice” or to a “valid discharge” might introduce uncertainty, since those terms were not universally understood. Yet another concern was that new paragraph (1) did not make sufficiently clear that it was intended to deal with situations where an assignment was not notified to the debtor and that it did not deal with the remedies available to the assignee to preclude the debtor from paying the assignor. After discussion, it was agreed that draft article 13 was not the appropriate place to deal with those concerns and that they might need to be taken up in a different context, e.g. draft article 14, which dealt with defences of the debtor.

183. A number of drafting suggestions were made, including: that the title of draft article 13 should be revised so as to refer to the discharge of the debtor; and that paragraph (1) should clearly indicate that it dealt with cases in which there was an assignment but not a notification of the debtor.

184. After discussion, the Working Group found the substance of new paragraph (1) to be generally acceptable and requested the Secretariat to prepare a revised draft, taking into account the concerns expressed and the suggestions made.

New paragraph (2)

Chapeau

185. For the reason mentioned in the context of the discussion of new paragraph 1, it was agreed that the reference to the validity of the notice should be deleted (see paragraph 182, above). As a result, it was suggested that the chapeau should read as follows: “For the purposes of this article, notice means:”. 
New subparagraphs (a) and (b)

186. The concern was expressed that reference to signature in subparagraph (b) introduced an unnecessary degree of formality and failed to take into account that the definition of “writing” contained in draft article 2(6) covered both form and requirements of authentication. After discussion, the Working Group decided that new subparagraphs (a) and (b) should be merged into a single subparagraph, along the lines of draft article 13(2)(a) as presented in the note by the Secretariat (A/CN.9/WG.III/ WP.87).

New subparagraph (c)

187. The Working Group found the substance of new subparagraph (c) to be generally acceptable. On that basis, the Secretariat was requested to prepare a revised draft that would refer to the possibility of notification being given in relation to future receivables, subject to some time-limitation, and to the identification of the person to whom the debtor would have to pay, along the lines of draft article 13(2)(b) as presented in the note by the Secretariat.

New subparagraph (d)

188. It was generally felt that new subparagraph (d) could inadvertently result in interfering with the law of the country in which payment was to be made, and that it could be misread as giving the assignee the right to modify the payment terms existing under the contract between the assignor and the debtor. After discussion, the Working Group decided to delete new subparagraph (d).

New paragraph (3)

189. Several concerns were raised with regard to new paragraph (3). One concern was that it could have the unintended result of making notification a condition of validity of the assignment. Another concern was that new paragraph (3) did not sufficiently address the situation in which the notification was in accordance with draft article 13 but the assignment was invalid, e.g. because of fraud between the assignor and the assignee, falsification of an assignment or lack of authority of the person signing the assignment. In order to address that concern, it was suggested that new paragraph (3) should be revised to provide that the debtor would not be discharged by paying the assignee if the assignment was invalid and, in particular, if the debtor knew of the invalidity of the assignment. It was widely felt, however, that the debtor should not be burdened with the need to make a determination as to the legal validity of the assignment. It was explained that, while the debtor could be expected to establish that assignment had taken place as a matter of fact, it could not be required to determine that assignment was valid as a matter of law.

190. In order to avoid introducing doubts as to whether the debtor could discharge its obligation by paying the assignee, the suggestion was made that it might be sufficient to state in new paragraph (3) that the debtor was discharged if it acted in good faith. Alternatively, it was suggested, the matter should be left to the applicable domestic law to be determined in accordance with draft article 22. In that connection, it was observed that references to “the assigner” and “the assignee” indicated that draft article 13 appeared to be predicated on the assumption that cases in which there was no valid assignment were not covered.

191. Another suggestion was that the matter might be sufficiently dealt with by a provision requiring that the assignee should be able to notify the debtor only with the authority of the assignor, a provision which the Working Group had decided to delete at its previous session (A/CN.9/420, paras. 119 and 120). It was stated that a distinction should be drawn between notifications of assignments given by assignors and notifications given by assignees. In the former case, it was observed, the invalidity of the assignment should not preclude the debtor from discharging its obligation by paying the assignee, since the assignor, having given the notification, should be estopped from raising the invalidity of the assignment. In the latter case, it was added, the debtor should not be discharged if it paid the assignee. Yet another suggestion was that, instead of making the validity of the assignment a condition for the validity of the notification, the notification should be required to include “adequate proof” of the assignment. It was observed that while market practice could accommodate all types of notification, it was important to avoid complicating the notification process with excessive requirements, since such an approach would have an adverse impact on the cost of credit.

192. After discussion, the Working Group decided that new paragraph (3) should be restructured to provide a clear rule, along the lines of draft article 13(5) as presented in the note by the Secretariat, for the discharge of the debtor’s obligation in case of notification. In addition, new paragraph (3) should refer to the absence of prior notification of an assignment or of “measures aimed at attaching the assigned receivables, as well as of measures effected by operation of law”, along the lines of draft article 13(2)(c) as presented in the note by the Secretariat. Moreover, the Working Group requested the Secretariat to present alternative provisions with regard to discharge of the debtor in case of notification of an invalid assignment.

New paragraph (4)

193. The Working Group noted that the first provision of new paragraph (4) (“Nothing herein shall affect any obligation which may be imposed on the debtor by any court order in relation to its payment obligations”) dealt with the issue addressed in draft article 13(2)(c) as presented in the note by the Secretariat. It was agreed that that first provision should be deleted, in view of the decision of the Working Group to retain the principle expressed in draft article 13(2)(c).

194. As to the second part of new paragraph (4) (“Nothing herein shall affect the right of the debtor to seek directions with respect to its payment obligations from any court having jurisdiction”), the Working Group felt that it dealt with issues that were addressed in more detail in draft article 13(3) as presented in the note by the Secretariat, and should be addressed in that context (see paragraphs 195-202, below).
Paragraph (3)

195. There was general agreement that the principle embodied in paragraph (3), i.e. that the debtor should have a right to request proof of the assignment and that, should no such proof be provided, the debtor would be allowed to pay the assignor and be discharged from its obligation to pay, was acceptable.

196. A question was raised as to whether proof of the assignment under paragraph (3) should be sought from the assignee only, or whether it could also be requested from the assignor. It was suggested that information as to a possible change in the identity of the payee would normally be sought by the debtor from the assignor. Another suggestion was that a solution to that question might be found if the draft convention were to provide that notification of the assignment should be given both by the assignor and the assignee, whether as a joint notification or separately in two distinct notifications. The suggestions were objected to on the ground that it might be in the interest of the assignor not to provide the debtor with proof of the assignment, particularly in view of the fact that, failing to obtain such proof, the debtor would be inclined to seek discharge from its obligation by paying the assignor, as provided in paragraph (3).

197. It was generally agreed that, while in some cases it might be advisable for the debtor to consult with the assignor in case of doubt as to whether payment should be made in compliance with a notification of assignment, proof of the assignment should be sought from the assignee only. After discussion, the Working Group found the substance of paragraph (3) to be generally acceptable.

198. A concern was expressed, however, that the notion of "adequate proof" might be difficult to interpret. In particular, it appeared to burden the debtor with the risk that resulted from the need to determine what might constitute "adequate" or "sufficient" proof. With a view to alleviating that concern, it was suggested that a more objective test (which was described as a "safe harbour clause") should be provided by adding wording along the following lines to the text of paragraph (3): "Adequate proof can be served by the production of any document emanating from the assignee and indicating that the assignment has been made". After discussion, the suggestion was adopted by the Working Group.

199. In the discussion, the view was expressed that, in case of doubt as to the existence or validity of the assignment, additional mechanisms should be introduced in the draft convention to protect the interests of the debtor. One suggestion was that, where the debtor failed to obtain proof of the assignment, it should have an express right to seek directions with respect to its payment obligations from any court having jurisdiction, as suggested in new paragraph (4). As a further addition to the text, it was suggested that, in case of doubt, the debtor should be allowed to discharge its payment obligation through other mechanisms that might be available under the laws of certain countries. For example, discharge could be obtained through payment being made into court, or into a specific public bank account, pending verification as to the existence or validity of the assignment.

200. The attention of the Working Group was drawn to the fact that, whatever mechanism was provided for the protection of the debtor under paragraph (3), it should be compatible with the operation of bulk-assignment systems, where large numbers of small-amount receivables were transferred, and neither the assignor nor the assignee could be expected to make extensive verifications with respect to each individual receivable covered by the transaction. It was stated that, should such verifications become necessary under the draft convention, the costs related to assignment transactions were likely to increase considerably, thus contradicting one of the main objectives of the draft convention, i.e. to enhance the availability of credit and lower the related costs.

201. A widely shared view was that, should more elaborate rules be provided under paragraph (3), they should be limited to certain types of transactions, i.e. transactions involving large-amount assignments, but that they should not apply, for example, to bulk assignments of low-amount receivables. A note of caution was struck about extending the provisions of paragraph (3) to cover the above-mentioned mechanisms, since in many cases such mechanisms might appear impractical, and even detrimental to the situation of the debtor which they purported to protect, particularly if the debtor was to be interpreted as inviting litigation. A suggestion was made that the issue might best be dealt with by way of a general provision recognizing the availability under the draft convention of the mechanisms established by national law for the protection of the debtor. It was generally agreed that the discussion might need to be continued at a future session.

202. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (3), reflecting the various views expressed and suggestions made as possible variants.

Paragraph (4)

203. The Working Group noted that paragraph (4) established a rule with respect to the discharge of the debtor's obligation to pay in situations where the debtor received notification of more than one assignment. It was generally felt that discussion of the issues dealt with in paragraph (4) should be postponed until the Working Group had completed its review of the issue of priority under draft article 18 (see paragraph 252, below).

Paragraph (5)

204. The Working Group confirmed its decision that the issues dealt with in paragraph (5) should be addressed in the context of the revised structure of paragraphs (1) and (2).

Article 14. Defences and set-offs of the debtor

205. The text of draft article 14 as considered by the Working Group was as follows:
“(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) The debtor may assert against the assignee any right of set-off in respect of claims existing against the assignor in whose favour the receivable arose [or claims existing against the assignee] and available to the debtor at the time notification of assignment conforming to paragraph (2) of article 13 was given to the debtor.

“(3) Notwithstanding paragraphs (1) and (2), defences and set-offs 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.”

**Paragraph (1)**

206. Broad support was expressed in favour of paragraph (1), which reflected an essential principle for the debtor’s protection, namely, that the debtor’s legal position should not be negatively affected as a result of the assignment, which was also reflected in draft articles 6(1)(b), 17(2) and 19. It was agreed that paragraph (1) covered all defences, including: contractual claims which, in some legal systems, might not be considered “defences”; rights for contract avoidance, e.g. for mistake, fraud or duress; exemption from liability for non-performance, e.g. because of an unforeseen impediment beyond the control of the parties (see United Nations Sales Convention, art. 79); and rights arising from pre-contractual dealings. The attention of the Working Group was drawn to the fact that, in view of the decision of the Working Group to cover non-contractual receivables, the reference to the “original contract” should be expanded so as to possibly refer to the “original obligation”. After discussion the Working Group approved paragraph (1) subject to the suggested modification.

**Paragraph (2)**

207. It was noted that, while paragraph (1) dealt with defences of the debtor arising from the original contract, paragraph (2) was intended to address rights of set-off arising from separate dealings between the assignor and the debtor. In addition, it was noted that the right of set-off of the debtor against the assignee was limited to those rights existing at the time of assignment, in order to protect the assignee from the consequences of dealings between the assignor and the debtor, of which the assignee could have no knowledge.

208. While paragraph (2) was found to be generally acceptable, the concern was expressed that the right of set-off of the debtor against the assignee arising from separate dealings between the debtor and the assignee, which appeared within square brackets, should be available at all times and not only up to the time of notification of the assignment. In order to address that concern, it was generally agreed that the bracketed language should be deleted. Subject to that change, the Working Group found the substance of paragraph (2) to be generally acceptable.

**Paragraph (3)**

209. It was noted that paragraph (3) was consistent with variant A of draft article 8(1), which the Working Group had decided to retain unchanged. A concern was expressed that paragraph (3) might need to indicate more clearly that it was intended to refer to both defences and set-offs, in order to ensure that the debtor would not be able to assert the breach of a no-assignment clause against an assignee, either as a defence or as an independent claim, on grounds such as interference with contract rights. Doubts were expressed, however, as to whether the breach of the original contract could be raised by the debtor as a set-off. After discussion, the Working Group approved the substance of paragraph (3) and decided that it should be retained without square brackets.

**Article 15. Modification of the original contract**

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

“A modification of or a [substitution for] [novation of] the original contract shall be binding on the assignee and the assignee shall acquire corresponding rights under the modified or new contract, provided that it is foreseen in the agreement between the assignor and the assignee or is later consented to by the assignee in writing.”

211. It was noted that draft article 15 was a new article, introduced further to a suggestion made at the previous session of the Working Group (A/CN.9/420, para. 109). It was intended to counterbalance, on the one hand, the need to recognize the contractual freedom of the assignor and the debtor to modify their contract in order to address changing commercial realities and, on the other hand, the need to protect the assignee from changes in the original contract that might affect the assignee’s rights. It was observed that the effect of draft article 15 would be that, if the assignor and the debtor modified the original contract without the general or specific approval of the assignee, such a modification would not be valid with respect to the assignee.

212. While it was generally agreed that modification of the original contract was an important issue that arose frequently in practice and should be addressed in the draft convention, several concerns were expressed both as to the substance and as to the specific formulation of draft article 15.

213. One concern was that, in its current formulation, draft article 15 could inadvertently result in eliminating the right of the debtor and the assignor to modify their contract in order to meet their changing needs. In order to limit the effect of what was said to be an excessively strict rule, the suggestion was made that modifications made before notification of the assignment should be treated as binding on the assignee in all cases, while modifications made after notification should be binding on the assignee only if the assignee had given its general or specific consent. In support of such an approach, it was observed that after notifi-
cation, the assignee became part of a triangular relationship, and its interests should also be taken into account, alongside the interests of the debtor and the assignor. Alternatively, it was suggested that modifications after notification could bind the assignee only if “made in good faith and in accordance with reasonable commercial standards” (see United States Uniform Commercial Code, article 9-318(2)).

214. Another concern was that draft article 15 might, in certain cases, conflict with draft article 14. The example was given of a case in which, under draft article 14, the debtor could raise as a defence the reduction of the price of the goods because of lack of conformity of the goods to contract specifications, while, under draft article 15, that reduction of price could be regarded as a modification of the original contract which would not be binding on the assignee unless it was foreseen in the assignment or the assignee subsequently consented to it. In response, it was observed that draft articles 14 and 15 dealt with different issues and that in the example given, under draft article 15, the debtor could pay to the assignee the reduced price, while the assignee would have recourse against the assignor.

215. As a matter of drafting, it was observed that it was unlikely that the agreement between the assignor and the assignee would contain a clause on modifications of contracts from which the assigned receivables might arise. It was thus suggested that the word “foreseen” should be replaced by the words “not prohibited”.

216. In the discussion, the question was raised whether modifications in the assignment after notification should be binding on the debtor or whether a new notification of the modified assignment would be necessary. It was observed that, in line with draft article 13, the debtor was not bound by an assignment unless it had received the corresponding notification. However, a concern was expressed that establishing a duty for a second notification of the debtor about the modification of the assignment after the initial notification could have the unintended effect of increasing the cost of financing transactions involving the bundling of a large number of low-value receivables.

217. After discussion, the Working Group requested the Secretariat to prepare a revised draft of article 15, taking into account the suggestions made and presenting variants as to the way in which the effect of modifications of the original contract on the assignee should be treated. As to the modification of the assignment, the Working Group requested the Secretariat to prepare a draft provision for the consideration of the Working Group at a future session.

Article 16. Waiver of defences

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

“(1) For the purposes of this article a waiver of defences is an explicit written agreement by the debtor with the assignor or the assignee according to which the debtor undertakes not to assert against the assignee the defences that it could raise under article 14.

“(2) A waiver of defences, made at the time of the conclusion of the original contract or thereafter, shall preclude the debtor from asserting defences [the availability of which the debtor knew or ought to have known at the time of waiver].

“(3) The following defences may not be waived:

“(a) defences arising from separate dealings between the debtor and the assignee;

“(b) defences arising from fraudulent acts on the part of the assignee;

“[...]

“(4) A waiver of defences may only be revoked by an explicit written agreement.

“(5) A written and explicit indication of consent of the debtor to the assignment after notification is deemed to be a waiver of defences.

“(6) The provisions of this article shall not apply to assignments of consumer receivables.”

Paragraph (1)

219. The Working Group noted that the term “waiver of defences” was defined in paragraph (1) to avoid introducing uncertainty as to its meaning. Views were exchanged as to whether paragraph (1) should cover waivers of defences in general, or whether it should establish a distinction between waivers that might be agreed, before notification, between the debtor and the assignor and waivers agreed, after notification, between the debtor and the assignee.

220. One view was that, while paragraph (1) appropriately covered waivers of defences agreed between the debtor and the assignor, it should not attempt to address waivers of defences agreed between the debtor and the assignee, which should be left entirely to the discretion of the parties. It was stated that none of the substantive provisions contained in paragraphs (2) to (6) were appropriate in the context of the relationship between the debtor and the assignee, since the purpose of those provisions was precisely to limit the freedom of parties as to waivers of defences. It was thus suggested that the words “or the assignee” should be deleted, or that, alternatively, agreements between debtors and assignors might be treated differently in paragraphs (2) through (6) from agreements between debtors and assignees. The prevailing view, however, was that the definition of “waiver of defences” in paragraph (1) should also cover direct agreements that might be concluded between the debtor and the assignee, waiving the right of the debtor to assert against the assignee the defences it might have against the assignor.

221. After discussion, the Working Group found the substance of paragraph (1) to be generally acceptable. The Working Group agreed that, when considering paragraphs (2) to (6), it might need to consider whether the framework established by those paragraphs as to waivers of defences would appropriately cover waivers made between the
debtor and the assignee. As a matter of drafting, it was suggested that the reference to draft article 14 might need to be clarified to indicate that not only defences but also rights of set-off could be waived.

**Paragraph (2)**

222. It was noted that the words “made at the time of the conclusion of the original contract or thereafter” reflected a suggestion made at the previous session of the Working Group that the provision should specify the point of time at which a waiver would be made. It was recalled that the time of the conclusion of the original contract between the debtor and the assignor, was instrumental in determining the credit terms that the assignee could make available to the assignor, which in turn could affect the credit terms offered to the debtor. It was also recalled that there were cases in practice, in which a waiver would be made, or an earlier waiver modified, subsequent to the conclusion of the original contract between the debtor and the assignor (see A/CN.9/420, para. 138).

223. The view was expressed that there was no reason to limit the scope of the provision to waivers made at the time of the conclusion of the original contract or after that time. It was pointed out that, in a number of practical situations involving future receivables, waivers were made before the original contract was concluded. For example, it was said that a vital element in assignment of future credit-cards receivables was that such waivers were made before the original contract was concluded. After discussion, the Working Group decided that the reference to the time when the waiver was made should be deleted.

224. With respect to the words between square brackets (“the availability of which the debtor knew or ought to have known at the time of waiver”), it was generally felt that any reference to what the debtor “knew” at the time when the waiver was made would inject an undesirable degree of uncertainty and subjectivity, which would have an adverse impact on the cost of credit. While a view was expressed that the words between square brackets should be retained for purposes of debtor protection, the Working Group decided that they should be deleted.

225. The view was expressed that the remainder of paragraph (2) (“A waiver of defences shall preclude the debtor from asserting defences”) might be regarded as merely stating the obvious. In addition, it was observed that that formulation would replace the contractual and estoppel basis of the waiver with a convention basis, thereby possibly affecting other law applicable to such waivers. It was thus suggested that those words might be deleted or, alternatively, replaced by a general reference to national law applicable to waivers of defences. The prevailing view, however, was that those words were useful and should be retained. It was pointed out that, in certain countries, wording along the lines of paragraph (2) was necessary to avoid the risk that a court applying national law might overrule a waiver of defences on the ground that such a waiver might be unfair to the debtor. As a matter of drafting, it was suggested that consideration might be given to the possibility of combining paragraph (2) with paragraph (1).

226. A question was raised as to whether draft article 16 should recognize blanket waivers, covering all possible defences, or whether only identified defences could be waived. The Working Group agreed that the issue might need to be discussed further at a future session.

**Paragraph (3)**

227. The Working Group found the substance of paragraph (3) to be generally acceptable. With respect to sub-paragraph (b), a suggestion was made that the exclusion of defences arising from fraudulent acts should be made subject to domestic law, so as not to affect situations where domestic law might allow the waiver of defences arising from fraudulent acts, e.g. fraudulent acts on the part of employees of a party. It was generally felt, however, that waivers of defences arising from fraudulent acts on the part of the assignee should be prohibited.

228. The discussion focused on the question whether further defences that might not be waived should be listed. It was noted that paragraph (3) was based on article 30(1)(c) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (hereinafter referred to as “the Bills and Notes Convention”). The view was expressed that, in the preparation of the draft convention, attention should be given to possible analogies between situations covered by the draft convention and certain provisions of the Bills and Notes Convention. Accordingly, it was stated that one of the possible objectives of the draft convention might be that receivables should be treated, to a large extent, like negotiable instruments. It was suggested that the draft convention should afford the assignee the same level of protection as afforded to the protected holder by the Bills and Notes Convention.

229. Various suggestions were made for possible additions to the list of exclusions contained in paragraph (3). One suggestion was that defences arising from fraudulent acts on the part of the assignor should be excluded. After discussion, it was decided that the words “or the assignor” should be added at the end of subparagraph (b) between square brackets. Other suggestions were that other defences taken into account by article 30 of the Bills and Notes Convention should also be excluded. It was agreed that the issue might need to be discussed further at a future session.

230. The view was expressed that paragraph (3) should contain an indication that a waiver of defences was only possible to the extent permitted by the law applicable to the relationship between the assignor and the debtor. Reference was made in that connection to the understanding that the draft convention was not intended to override other applicable law dealing with questions of validity of waivers of defences.

231. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (3), taking into account the suggestions made.

**Paragraph (4)**

232. It was noted that paragraph (4) established the rule that revocation of the waiver should be “explicit”, and
made by way of a “written agreement”. While there was agreement as to the substance of the rule, a number of concerns were expressed as to its precise formulation. One concern was that use of the term “revoked” gave the impression that a unilateral act was meant and not an agreement. In order to address that concern, the suggestion was made that reference should rather be made to “modification” of the waiver. Another concern was that the reference to an “explicit written agreement” could inadvertently result in invalidating waivers contained in standard terms and conditions. In order to allay that concern, the suggestion was made that the term “explicit” should be deleted. It was observed that a reference to a written agreement should be sufficient and in line with the terminology used in the United Nations Sales Convention. After discussion, the Working Group approved paragraph (4) subject to the modifications suggested.

**Paragraph (5)**

233. It was noted that paragraph (5), which had been inserted pursuant to a suggestion made at the previous session of the Working Group, provided for an implied waiver of defences in case of acceptance of the assignment by the debtor. It appeared within square brackets, since it might be inconsistent with the principle embodied in paragraph (1) that, in order to protect the debtor from unintentionally waiving defences, any waiver of defences should be explicit. It was generally agreed that the debtor’s acceptance of the assignment should not be considered as a waiver of defences. However, the view was expressed that the practice in which the debtor’s consent was treated as a waiver of defences could be accommodated by referring to trade usages in the interpretation of assignment, a matter covered under draft article 10(4). After discussion, the Working Group decided to delete paragraph (5).

**Paragraph (6)**

234. It was recalled that the Working Group had decided to take a broad approach as to the types of assignments and the types of receivables to be covered by the draft convention, without excluding assignments of consumer receivables. In confirming its decision, the Working Group noted that there already existed a significant market involving credit being extended on the basis of consumer receivables, which allowed access to lower-cost credit to manufacturers, retailers and consumers and which should not be interfered with.

235. A number of concerns were expressed with regard to paragraph (6). One concern was that it was not clear whether it made it impossible for consumers to waive their defences or whether such a waiver was left to the applicable domestic law. Another concern was that paragraph (6) might be inconsistent with domestic law applicable on consumer protection. Yet another concern was that in the context of bulk assignments of large numbers of low-value receivables, it was impractical to require parties to determine the consumer or commercial nature of the receivables assigned. In order to address those concerns, the suggestion was made that paragraph (6) should be deleted.

236. That suggestion was objected to on the ground that allowing waivers of defences in a consumer context might run counter to well-established consumer protection principles and might unnecessarily complicate the draft convention thus compromising its acceptability.

237. In response, it was observed that, as a matter of principle, the main aim of the draft convention was not to protect consumers, which was in any case a matter for the applicable domestic law, but to increase the availability of lower cost credit, to all parties, including consumers. In addition, it was stated that the only effect of the deletion of paragraph (6) would be that the draft convention would leave consumer protection issues to the applicable domestic law. If necessary, it was suggested, a note could be included in the text indicating that the draft convention did not override consumer protection laws. It was noted that that approach was followed in the UNCITRAL Model Law on International Credit Transfers and in the UNCITRAL Model Law on Electronic Commerce. However, a note of caution was struck that such an approach might be inappropriate in the present context and might cast a doubt on practices involving consumer receivables, such as the practice of securitization of consumer credit card receivables.

238. After discussion, the Working Group decided to delete paragraph (6) and requested the Secretariat to consider including in the text a footnote within brackets clarifying that the draft convention did not override consumer protection laws. As a result of that decision, the Working Group noted that there remained no provision in the text referring to consumer receivables and, accordingly, decided to delete paragraph (5) of draft article 2.

**Article 17. Recovery of advances**

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

“(1) Without prejudice to the debtor’s rights under article 14, failure of the assignor to perform the original contract does not entitle the debtor to recover a sum paid by the debtor to the assignee.

“(2) An assignment shall not prejudice the debtor’s rights against the assignor arising from the failure of the assignor to perform the original contract including, but not limited to the right of the debtor to recover from the assignor sums paid by the debtor to the assignee.”

**Paragraph (1)**

240. It was noted that paragraph (1) was aimed at ensuring that the debtor bore the risk of non-performance of the obligations of its contractual partner, i.e. the assignor, while preserving the defences that the debtor could assert against the assignee under draft article 14.

241. In response to a query raised, it was noted that, at its previous session, the Working Group had decided that draft article 17 should not include exceptions to the rule of the type included in the comparable provision of the Factoring Convention (article 10). Those exceptions included
the case in which the assignee had not paid or loaned money to the assignor as required in the financing contract, and the case in which the assignee was aware of the assignor's failure in performance of the original contract. It was considered that exceptions of that type were particular to specific cases of factoring, in which it was typical for a guarantee of performance to be given by the factor (assignee). Reflecting such exceptions in the general text being prepared would create obstacles to a variety of financing structures used in practice (A/CN.9/420, para. 146). In addition, it was observed that a rule along the lines of article 10 of the Factoring Convention might not be appropriate with regard to a number of transactions which, although labelled as “factoring”, involved assignments for servicing purposes. The view was expressed, however, that, in case a State ratified both the draft convention and the Factoring Convention, debtors whose debts had been factored commercially would be in a more advantageous position than debtors whose debts had been assigned under the draft convention, a result that was said to be unusual. As a matter of drafting, the suggestion was made that paragraph (1) should make it clear that it referred to recovery of advances from the assignee.

242. After discussion, the Working Group approved paragraph (1), subject to the drafting modification suggested.

Paragraph (2)

243. It was noted that paragraph (2), inserted pursuant to a suggestion made at the previous session of the Working Group, was intended to preserve the rights of the debtor against the assignor for breach of the original contract, in particular the right to recover from the assignor advance payments made by the debtor to the assignee (A/CN.9/420, para. 148).

244. There was broad support in the Working Group for the substance of the rule contained in paragraph (2). However, it was generally felt that it dealt with the fundamental principle that the assignment should not change the legal position of the debtor, which was also reflected, e.g. in draft articles 6(1)(b), 14 and 19, and should rather be placed at the beginning of the draft convention. As a matter of drafting, it was suggested that the reference to the right of the debtor to recover from the assignor advance payments made by the debtor to the assignee, was not necessary and could be deleted. After discussion, the Working Group approved the substance of paragraph (2) and requested the Secretariat to place it at the appropriate place in the text.

Article 18. Priority

245. The text of draft article 18 as considered by the Working Group was as follows:

“(1) Where a receivable is assigned by the assignor to several assignees, the [first assignee] [the first assignee to notify the debtor pursuant to article 13] [the first assignee to register the assignment] has priority.

“(2) The assignee has priority over creditors of the assignor, provided that [the assignment] [notification of the debtor] [registration of the assignment] occurred prior to the time at which the creditors of the assignor acquired a right in the assigned receivables.

“(3) In case of insolvency of the assignor, the assignee has priority over the insolvency administrator, provided that [the assignment] [notification of the debtor] [registration of the assignment] occurred before the effective date of the insolvency proceedings.

“(4) Without prejudice to other rules of law relating to priority, the preceding paragraphs shall not apply in the following cases: [...]"

“(5) The assignee may register at a public register in the location of the assignor a summary statement, which reasonably identifies the assignor, the assignee, the assigned receivables and the secured obligation, if any. In the absence of registration, [the first assignee] [the first assignee to notify the debtor] shall have priority, subject to paragraphs (2) and (3) of this article.

“(6) For the purposes of this article, priority means the right of a person to satisfy its claim against the assignor on the basis of the assigned receivables in preference to other persons.

“(7) Nothing in this article shall affect any provisions applicable to the insolvency of the assignor.”

246. It was generally agreed that uncertainty with regard to priority constituted an important obstacle to receivables financing, since creditors might withhold credit or make credit available at a higher cost if they were not certain that they would receive priority, in particular in case of insolvency of the assignor. Draft article 18 was, therefore, of paramount importance for a uniform law aimed at increasing the availability of credit.

Paragraph (1)

247. It was noted that paragraph (1) dealt with conflicts of priority between several assignees of the same assignor, and offered three optional rules as to how priority could be determined. The first option (“the first assignee has priority”) did not establish any mechanism for publicity of the assignment. The view was expressed that such a rule existed in certain national laws and that it might be considered as a possible secondary rule for determining priority under the draft convention. It was generally felt, however, that the principal rule for determining priority should somehow provide for the publicity of the assignment, so as to avoid practical difficulties with respect to evidence of the various assignments involved. It was also felt that, while priorities as to existing claims could appropriately be dealt with under a system based on the time of the assignment, such a system might raise practical difficulties in the context of assignments of future receivables and bulk assignments. After discussion, the Working Group decided that the first option should be deleted.

248. The discussion focused on the other two options ("the first assignee to notify the debtor pursuant to
article 13 has priority” and “the first assignee to register the assignment has priority”). In favour of adopting a system based on notification, it was stated that such a system was currently functioning satisfactorily under the laws of many countries. It was observed that deviating from such well-established practices would create risks of conflicts between rules governing domestic assignments and rules applicable under the draft convention. Such risks might have a negative effect on the acceptability of the draft convention, particularly in view of the decision made by the Working Group to extend its scope to cover international assignments of domestic receivables. In response, it was observed that a priority rule based on notification might result in less new credit for new markets.

249. A widely shared view was that adopting a system based on registration was, in theory, the best possible approach to the issues of priority. It was stated that such an approach could also be relied upon in practice, provided that the registration system satisfied certain criteria, for example, that it operated at a low cost, under transparent rules, and was easily accessible. Doubts were expressed, however, as to whether it was realistic to envisage that the legal, technical and political difficulties likely to arise in the context of the establishment of a registration system could be resolved in a time-frame that would not unduly delay the completion of the draft convention.

250. The suggestion was thus made that the draft convention might combine the two approaches by providing two sets of provisions, one based on registration and the other on notification, leaving it to contracting States to choose which approach they favoured. In addition, including the two sets of rules in the draft convention might be the best way of accommodating future technical developments, which might result in a more widespread use of registration.

251. The Working Group postponed its decision as to whether the issues of priority should be dealt with by way of registration or by way of notification. It was generally felt that, before such a decision could be made, more information was needed about the feasibility of a system based on registration. It was noted that work involving the issues of registration was currently being carried out by various international organizations, including UNIDROIT (in the context of the preparation of the draft convention on international interests in mobile equipment), and regional organizations such as the European Union and the North American Free Trade Association (NAFTA). The Secretariat was requested to investigate the issues involved in a possible registration system and to report to the Working Group, so that an informed decision could be made in that respect. The issues to be considered included: whether a registration system should be based on an international registry or on a linkage of national registries; whether the registration system should be paper-based or computerized; whether the role of a registrar should be purely administrative or whether it would be expected to make legal determinations, e.g. with respect to the legal validity of the registration; whether access to the registry should be free or limited to certain interested parties; what costs were involved by registration; which authentication techniques should be used; what should be the duration of the registration; and which rules could be envisaged for errors in registration, liability in case of error, and court jurisdiction.

252. The Working Group noted that, in the context of the discussion of draft article 13, it had postponed its deliberation on paragraph (4), which dealt with discharge of the debtor’s obligation to pay in the context of multiple assignments. After discussion, the Working Group found the substance of paragraph (4) of draft article 13 to be generally acceptable.

Paragraph (2)

253. Differing views were expressed as to whether paragraph (2) should be retained or deleted. One view was that, to the extent that paragraph (2) dealt with conflicts between the assignee and unsecured creditors of the assignor, it served no useful purpose and should be deleted. The prevailing view, however, was that paragraph (2), which should be read in conjunction with paragraph (3), provided certainty by establishing that the assignor had priority not only over the insolvency administrator but also over creditors of the assignor seizing the assigned receivables. In support of retention of paragraph (2), it was observed that paragraph (2) served the purpose of providing potential creditors of the assignor with the opportunity to determine whether the assignor’s receivables had been assigned. After discussion, the Working Group found the substance of paragraph (2) to be generally acceptable, subject to the decision to be made at a later stage with respect to paragraph (1).

Paragraph (3)

254. It was generally agreed that paragraph (3) should be revised to address the question whether future receivables assigned before the effective date of the insolvency of the assignor but arising after that date were effectively transferred, thus being excluded from the insolvency estate.

255. Differing views were expressed as to how that question should be addressed. One view was that the transfer of future receivables should be effective as from the time of the assignment, even if the receivables became due or were earned by performance after the effective date of the insolvency proceedings. Adopting such an approach, it was stated, could significantly facilitate receivables financing and increase the availability of lower-cost credit, since it would provide assignees with the certainty necessary to make credit available on the basis of bulk assignments of future receivables.

256. In opposition to that view, it was observed that such an approach would result in effectively removing the assigned receivables from the insolvency estate of the assignor, a result which might run counter to national rules applicable in case of insolvency. It was pointed out that such an interference with national insolvency rules might be undesirable since it would affect the interests of privileged creditors (e.g. State, employees) and thus upset the balance of interests established by national insolvency rules. It was, therefore, suggested that the transfer of future receivables should be effective with respect to the
257. In the discussion, the question was raised whether the time of the effective transfer of future receivables should differ depending on whether assignments by way of sale or by way of security were involved. The Working Group confirmed the approach taken in its discussion of draft article 12 that drawing such a distinction would be problematic. It was pointed out that, because of the variety in the forms of transfers agreed upon by the parties, and because of the wide differences among legal systems as to the classification of transfers, an assignment by way of security could, in fact, possess attributes of a sale, while a sale might be used as a security device.

258. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (3), presenting variants reflecting the views expressed. The Working Group decided that draft article 7(2), which also dealt with the time of transfer of future receivables, should reflect the same approach.

Paragraphs (4) to (6)

259. The Working Group noted that the contents of paragraphs (4) to (6) would depend on the approach to be adopted with regard to conflicts of priority in paragraphs (1) and (2), and decided to defer its discussion of paragraphs (4) to (6) until it had taken a decision on the issue of priority.

Paragraph (7)

260. In view of its discussion of paragraph (3), the Working Group requested the Secretariat to prepare a revised draft of paragraph (7), reflecting the possibility of the draft convention affecting to some extent the law applicable to insolvency. While it was recognized that the relationship between the draft convention and national rules applicable in case of insolvency should be examined with particular care, the Working Group was not opposed in principle to considering an approach aimed at harmonizing some aspects of the law applicable in case of insolvency. It was noted that, in a somewhat different context, that was the aim of the Working Group on Insolvency Law, which was preparing model legislative provisions on judicial cooperation and access and recognition in cross-border insolvency cases.

Article 19. Payment to a specified bank account and priority

261. The text of draft article 19 as considered by the Working Group was as follows:

“(1) If agreed between the assignor and the debtor before notification of the assignment pursuant to paragraph (2) of article 13, the debtor is entitled to pay into a bank account or a post office box specified in the agreement and be discharged from liability. After notification of the assignment pursuant to paragraph (2) of article 13, the debtor and the assignee may agree on the method of payment.

“(2) In case of an agreement between the assignor and the debtor pursuant to paragraph (1) of this article, the person in control of the bank account or the post office box specified in the agreement for the purpose of payment by the debtor has priority.”

Paragraph (1)

262. While support was expressed in favour of the principle embodied in paragraph (1), a number of suggestions were made. One suggestion was that the scope of the provision should be enlarged so as to cover cases in which there was no agreement between the parties for payment into an account in the country of the debtor. Another suggestion was that the payment should be treated as irrevocable so as to ensure discharge of the debtor’s obligation and the effective transfer of the receivable from the estate of the debtor. Yet another suggestion was that paragraph (1) should be moved to article 13, since it dealt with discharge of the debtor’s obligation. Subject to the suggested modifications, the Working Group approved the substance of paragraph (1).

Paragraph (2)

263. It was noted that under paragraph (2) the owner of the bank account into which the receivables were paid, who could draw on that account and was recognized by the bank as having that right, would prevail over creditors claiming a right in the assigned receivables. While support was expressed for the type of financing involving such payments, a number of concerns were expressed as to the formulation of paragraph (2). One concern was that it introduced uncertainty, since it was not clear whether it referred to the receivables or their proceeds. Another concern was that it might run counter to the rule on priority to be adopted in draft article 18. Yet another concern was that the reference to the person “in control” of the bank account might be unclear. The Working Group decided to retain paragraph (2) for further consideration at a future session.

Chapter IV. Subsequent assignments

Article 20. Subsequent assignments

264. The text of draft article 20 as considered by the Working Group was as follows:

“(1) [This Convention] [This Law] applies to any assignment by the initial or any other assignee to subsequent assignees, provided that [the initial] [such] assignment is governed by [this Convention] [this Law].

“(2) [This Convention] [This Law] applies as if the subsequent assignee were the initial assignee, however, the debtor may not assert against a subsequent assignee rights of set-off in respect of claims existing against an earlier assignee, with the exception of rights existing...
against the penultimate assignee who is the ultimate assignor].

"(3) "Variant A

"A subsequent assignment of receivables transfers the receivables to the assignee notwithstanding any agreement prohibiting or restricting such assignment. Nothing in this paragraph affects any obligation or liability of a subsequent assignee for breach of a no-assignment clause.

"Variant B

"An agreement ( ... ) prohibiting or restricting assignment of receivables is invalid. An assignment of a receivable transfers the receivables to the assignee notwithstanding such an agreement. Neither an assignor nor an assignee have any liability for breach of such an agreement.

"(4) Notwithstanding that the invalidity of an intermediate assignment renders all subsequent assignments invalid, the debtor may pay the first assignee to notify pursuant to paragraph (2) of article 13 and be discharged from liability."

Paragraph (1)

265. The concern was expressed that paragraph (1) might inadvertently result in excluding certain securitization transactions, which involved a series of subsequent assignments, merely because the initial assignment between affiliated companies located in the same State would be a domestic one. To address that concern, the suggestion was made that paragraph (1) should be revised to make it clear that subsequent assignments would be covered if they met the criteria for the application of the draft convention set forth in draft article 1. Subject to that revision, the Working Group approved the substance of paragraph (1).

Paragraph (2)

266. Support was expressed for the principle that the draft convention should apply to a subsequent assignee as if it were the initial assignee. As a matter of drafting, it was suggested that the opening words might read along the following lines: "The other provisions of this Convention ...". With regard to the rights of set-off, it was suggested that the matter could be dealt with in the original contract and should not be covered in the draft convention. Subject to the suggested drafting modifications, the Working Group approved paragraph (2) and decided that the reference to set-off should be retained within square brackets for further consideration at a future session.

Paragraph (3)

267. It was noted that paragraph (3) was intended to cover no-assignment clauses contained in refinancing contracts. The view was expressed that an approach along the lines of variant B could be considered, since no-assignment clauses contained in refinancing contracts were not aimed at protecting a debtor. However, as a result of the decision made during the discussion of draft article 8(1), the Working Group decided to delete variant B and to retain variant A on the understanding that variant A of draft article 20(3) should reflect a result consistent with variant A of draft article 8(1).

Paragraph (4)

268. Support was expressed for paragraph (4), which allowed the debtor to pay the first assignee to notify, without having to determine whether the assignments were valid. The view was expressed, however, that knowledge of the invalidity of the assignment should preclude the debtor from discharging its obligation by paying the assignee. The Working Group decided to retain paragraph (4), pending further consideration of the issue of knowledge of the invalidity of the assignment on the part of the debtor in draft article 13.

III. FUTURE WORK

269. Having concluded its deliberations on the draft convention on assignment in receivables financing, the Working Group noted that the Hague Conference on Private International Law planned to prepare and submit to the Working Group for consideration at its next session a paper on conflict-of-laws issues on assignment and related aspects of insolvency law. It was noted that the next session of the Working Group was scheduled to be held at Vienna from 11 to 22 November 1996.

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INTRODUCTION

1. At its twenty-eighth session, in 1995, the Commission discussed the topic of assignment in receivables financing and entrusted the Working Group on International Contract Practices with the work of preparing a uniform law on this topic.1

2. The Working Group commenced this task at its twenty-fourth session by reviewing a number of draft uniform rules set forth in a report of the Secretary-General (A/CN.9/412). At the conclusion of the session, the Working Group requested the Secretariat to prepare a revised version of the draft uniform rules on the basis of the deliberations and decisions of the Working Group (A/CN.9/420, para. 204).

3. The present note contains revised articles of the draft uniform rules and explanatory remarks to the draft provisions. Additions and modifications to the text are indicated by underlining. General reference is made to the relevant portions of the Working Group report (A/CN.9/420).

DRAFT UNIFORM RULES ON ASSIGNMENT IN RECEIVABLES FINANCING

Remarks:

Title

After having completed its consideration of the scope of application of the draft uniform rules, the Working Group might wish to consider their title.

Chapter I. Scope of application and general provisions

Article 1. Scope of application

(1) [This Convention] [This Law] applies to assignments of international receivables [and to international assignments of receivables made]

Variant A: for financing or any other commercial purposes.

Variant B: in the context of financing contracts,

( ... )

(a) [if the assignor and the debtor have their places of business in a Contracting State] [if the assignor or the debtor has its place of business in this State]; or

(b) [if the rules of private international law lead to the application of the law of a Contracting State].

( ... )

(2) A receivable is international if the places of business of the assignor and the debtor are in different States. [An assignment is international if the places of business of the assignor and the assignee are in different States].

References: A/CN.9/420, paras. 19-32
A/CN.9/420, draft article 1(1)


Substantive scope of application/financing

1. At its previous session, the Working Group considered the question whether the scope of application of the text should be limited by reference to the “financing” or, alternatively, to the “commercial” purpose of the assignment. Variant A avoids drawing a distinction between “financing” and “commercial” purposes, since many transactions, which at first sight seem to be commercial, are in reality a form of financing. In addition, a reference to only the financing purpose of an assignment might inadvertently result in excluding from the scope of the draft uniform rules transactions which, although they are inherently of a financing nature, are at times structured so as to serve general commercial purposes, e.g. factoring for accounting or insurance purposes. Moreover, referring to the purposes of the assignment would introduce uncertainty in relation to the application of the draft uniform rules, since their application would depend on an interpretation of the assignment with a view to ascertaining its purpose.

2. One of the reasons cited at the previous session of the Working Group for limiting the scope of the draft uniform rules to assignments for “financing” purposes was the need to avoid any overlap with the UNIDROIT Convention on International Factoring (“the Factoring Convention”). However, it should be noted that, even if the draft uniform rules were to apply only to assignments for financing purposes, they would overlap with the Factoring Convention, since assignment in the context of factoring would normally be an assignment for financing purposes. It is, therefore, submitted that the question of the relationship of the draft uniform rules and the Factoring Convention, or other international texts, should rather be dealt with in a special rule dealing with the international obligations of the State enacting the draft uniform rules (draft article 3).

3. Variant B is intended to define the scope of the draft uniform rules in an equally broad, but at the same time practical, way. In addition, it is aimed at covering both assignments that form an integral part of the financing contract (e.g. assignment in factoring transactions) and assignments that are made pursuant to a distinct contract (e.g. assignments in project financing transactions). Such an approach is consistent with the approach taken by the Working Group at its previous session to facilitate receivables financing practices with a view to increasing the availability of credit (A/CN.9/420, paras. 16 and 41).

4. The exact meaning of the financing contract could be defined along the lines of draft article 2(2), or be left undefined. It should be noted that a definition of “financing contract”, which could enhance certainty, might be difficult to achieve and, in addition, would run the risk of excluding some practices. On the other hand, while leaving that term undefined might introduce some uncertainty as to its exact meaning, it would have the advantage of recognizing in the draft uniform rules all the different financing practices that have already developed or might need to be developed in order to address the need for increased access to lower cost credit.
5. The Working Group might wish to consider further the question of the types of financing practices to be covered. Should the Working Group decide to take a broad approach, the question should be considered whether the same provisions could apply to all financing practices, or whether, apart from some general provisions that would apply to all practices, certain additional provisions would need to be prepared aimed at addressing the needs of particular practices. From a methodological point of view, the Working Group might wish to address all practices at the same time or, alternatively, to direct its attention initially to a particular practice or practices and to consider at a later stage whether the draft uniform rules could find application to other practices as well.

6. It should be noted that, at the previous session of the Working Group, it was indicated that there were sufficient differences between certain practices to justify their different treatment in the draft uniform rules. For example, in the context of the discussion on article 9(2) of the earlier draft, the view was expressed that a clear discharge rule for the debtor paying the assignee before notification of the assignment could have an adverse impact on practices, such as securitization, in which the debtor was expected to continue making payments to its initial creditor even after assignment (A/CN.9/420, para. 108).

7. In addition, in the context of its discussion on article 12 of the earlier draft, the Working Group was agreed that the exceptions contained in article 10 of the Factoring Convention (recovery of advance payments made by the debtor to the assignee in case of unjust enrichment or bad faith on the part of the assignee) should not be included in the respective article of the draft uniform rules, because those types of exceptions were peculiar to the factoring contract and reproducing them in the draft uniform rules could create obstacles to other receivables financing practices (A/CN.9/420, para. 145). Moreover, special rules might need to be developed if the assignment of partial and undivided interests in receivables were to be covered (A/CN.9/420, paras. 180-184).

**Internationality**

8. The chapeau of article 1 reflects the approach generally supported by the Working Group at its previous session that the draft uniform rules should cover both international and domestic assignments of international receivables (A/CN.9/420, para. 26). With regard to domestic assignments of international receivables in which the assignor and the assignee would be located in one country and the debtor would be located in another, the Working Group might wish to avoid dealing with domestic relationships (e.g. the relationship between the assignor and the assignee) and to deal exclusively with international relationships (e.g. the relationship between the assignor and the assignee). It should be noted that the Factoring Convention focuses on the internationality of the original contract and applies to assignments of international receivables only (article 2.1).

9. The reference to international assignments, which would result in the draft uniform rules covering international assignments of domestic receivables, has been included in order to reflect a suggestion made at the previous session of the Working Group. It appears within small brackets since that suggestion raised a number of concerns, including that it would be undesirable for the domestic debtor, in particular if it were a consumer, to find its legal position subjected to a different legal regime merely because the domestic creditor chose to assign its receivables to a foreign assignee; such an approach might inadvertently lead to disunification and uncertainty, since domestic receivables would be governed by a different legal regime depending on whether they were assigned to a foreign assignee or not, which the debtor could not predict at the time of the conclusion of the original contract; attempting to cover domestic receivables could negatively affect the acceptability of an international registry since States would have more difficulties in accepting international registration of domestic receivables (A/CN.9/420, paras. 27-29 and 159).

10. On the other hand, coverage of international assignments of domestic receivables could facilitate receivables financing by providing domestic traders with easier access to international financial markets (e.g. securitization of credit card receivables). In addition, such an approach could enhance competition among financing institutions with the beneficial result of lowering the cost of credit. Moreover, the wider the scope of application of the rules the higher the degree of uniformity and certainty that could be achieved.

11. In determining which approach to follow, the Working Group might wish to weigh the potential disadvantage for the debtor of having to pay a foreign creditor against the potential advantage both for the assignor and for the debtor of having increased access to lower cost credit. In addition, in order to reduce the potential negative impact of an international assignment on the interests of the domestic debtor, in particular if the debtor were a consumer, the Working Group might wish to consider dealing exclusively with commercial relationships (e.g. the relationship between the assignor and the assignee).

12. An alternative to that approach might be to cover the assignee-debtor relationship as well but to reconsider a number of provisions in order to address concerns about consumer protection. For example, in a consumer context: no-assignment clauses might need to be upheld; waiver of defences might be invalidated or made more difficult; the debtor's protection might need to be further strengthened; the approach based on payment to a bank account or post office box might need to be considered in more detail (draft article 19); and additional provisions dealing with matters such as priority between foreign and domestic assignees of domestic receivables or other domestic creditors of the assignor might have to be developed.

**Territorial scope of application**

13. Subparagraph (a) is intended to reflect the view expressed at the previous session of the Working Group that the assignee does not need to have its place of busi-
ness in a State that has adopted the draft uniform rules, since in cross-border assignments the assignee would tend to seek to enforce the assignment in the State where the debtor or the assignor is located (A/CN.9/420, para. 30). The Working Group might wish to reconsider this approach since there may be cases in which the law of the State in which the assignee has its place of business might be relevant, if it is the applicable law and provides for the courts of that State to have jurisdiction (assignments often contain a clause giving jurisdiction to the courts of the country of the assignee). It should be noted that the Factoring Convention requires that the assignor and the debtor have their places of business in different States, and that those States and the State in which the assignee has its place of business be Contracting States (article 2.1(a)).

14. Subparagraph (b) has been placed within square brackets pursuant to a concern expressed at the previous session of the Working Group that referring to private international law rules for the purpose of determining the scope of application of the draft uniform rules was bound to introduce uncertainty (A/CN.9/420, para. 31). It may be noted that this provision was drawn from article 1(1)(b) of the United Nations Convention on Contracts for the International Sale of Goods (“the Sales Convention”).

Convention or model law

15. The current version of the draft uniform rules contains a number of alternative draft provisions requiring a choice to be made between the form of a convention or of a model law (e.g. paragraphs (1)(a) and (b) of draft article 1, draft article 3 and draft articles 21-23). The first bracketed language contained in paragraph (1)(a), as well as paragraph (1)(b) would be suitable, if a convention were to be prepared. If work by the Commission were to take the form of a model law, the second bracketed language in paragraph (1)(a) could be retained, while paragraph (1)(b) would be inappropriate.

16. In view of the above, the Working Group might wish to consider, at an appropriate time during the present session, the form of the text to be prepared with a view to adopting a working assumption. The working assumption could be reviewed at a later stage in light of the content of the draft articles.

17. Generally speaking, in favour of a convention it could be argued that it would create a higher degree of uniformity and certainty and that it would be more suitable if a world registry were to be established, while a model law would allow States more flexibility in adjusting the draft uniform rules to their domestic legislation (for a brief discussion of registration in the context of a convention or a model law, see draft article 18, remark 8).

Mandatory or non-mandatory character of the rules

18. The Working Group might wish to address the additional question whether the parties to the assignment (assignor-assignee), or the parties to the original contract as well (assignor-debtor), should be allowed to opt out of the draft uniform rules, in whole or in part.

19. A number of arguments could be raised against an opting-out clause, including that: third parties would not be able to verify whether the assignor had made prior assignments in which the assignor and earlier assignees might have excluded the application of the draft uniform rules; it would be inappropriate to allow the parties to the assignment or to the original contract to determine the law governing the transfer of property on receivables, which is normally not within the purview of party autonomy; and that an opt-out clause should be unnecessary, since it would be rather unlikely that the assignor, the assignee or the debtor would wish to exclude the application of rules which would be aimed at increasing the availability of credit.

20. On the other hand, in favour of an opting-out clause, it may be argued that: the debtor, to the extent that its legal position might be changed as a result of the assignment, would have a legitimate interest in excluding the application of the draft uniform rules; and that a mandatory regime might be less acceptable than a regime which would allow parties to derogate from it.

21. It may be noted that under article 3 of the Factoring Convention both the parties to the factoring contract and the parties to the original contract may exclude the application of the Convention as a whole. However, under article 3(b) of the Factoring Convention, exclusions contained in the original contract are valid towards the factor (assignee) only to the extent the factor was given prior written notice of the exclusion.

22. If the draft uniform rules were to adopt an opting-out approach, the Working Group might wish to consider addressing the conflict of priority between assignees the rights of whom would be covered by the draft uniform rules and assignees whose rights might be subject to a different legal regime as a result of the exclusion of the application of the rules.

Article 2. Definitions

For the purposes of this [Convention] [this Law]:

(1) “Assignment” means the agreement to transfer receivables from one party (“assignor”) to another party (“assignee”) (...), by means of sale, by means of security for performance of an obligation, or by any other way except delivery and/or endorsement of a negotiable instrument (...).

(2) “Financing contract” means the contract in the context of which the assignor assigns its receivables to the assignee, while the assignee provides financing or other related services to the assignor or another person (...). Financing contracts include, but are not limited to, factoring, forfaiting, refinancing, in particular securitization, and project financing).

(3) “Receivable” means any right (...) to receive or to claim the payment of a monetary sum in any currency for commodity easily convertible into money.

(a) “Receivable” includes, but is not limited to:
(i) any right arising from a contract ("the original contract") made between the assignor and a third party ("the debtor");
(ii) future receivables; and
(iii) partial and undivided interests in receivables.

(b) Receivable" does not include: [

(4) "Future receivable" means:
(a) a receivable which, while arising from a contract existing at the time of assignment, is not due at the time of assignment or has not yet been earned by performance; and
(b) a receivable that might arise from a contract expected to be concluded after the conclusion of the assignment.

[5] "Consumer receivable" means a receivable arising from a transaction made for personal, family or household purposes.

(6) "Writing" means any form of communication which preserves a complete record of the information contained therein and provides authentication of its source by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.

(7) If a party has more than one place of business, the place of business is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the conclusion of that contract. If a party does not have a place of business, reference is to be made to its habitual residence.


Remarks:

"Assignment"

1. The definition of "assignment" has been revised in order to refer to the agreement between the assignor and the assignee, instead of to the actual transfer, since that result is accomplished by the revised draft articles 6 and 7 ("an assignment transfers"). This revision, as well as the corresponding revision of draft articles 6 and 7, is intended to overcome the difficulty of clearly distinguishing between the notions of validity and effectiveness of assignment indicated during the discussion of the provision on bulk assignments which took place during the previous session of the Working Group. It should be noted that, under the current definition of "assignment", transfers of receivables by operation of law, which might involve public policy considerations, would be excluded from the scope of application of the draft uniform rules. These should be covered with the exception of transfers of receivables by way of endorsement (A/CN.9/420, paras. 38-39). It would seem that, for the same reasons cited by the Working Group, transfers of receivables by way of delivery of a bearer document would also need to be excluded. The reference to "financing" was deleted pursuant to reservations expressed at the previous session of the Working Group as to the necessity of making "financing" an element of the definition of "assignment" (A/CN.9/420, paras. 40-43). The reference to the financing contract or to the financing purpose of the assignment in draft article 1 should be sufficient for the purpose of limiting the scope of the draft uniform rules to assignments made in a financing context.

3. The Working Group might wish to define the terms "assignor", "assignee" and "debtor" in more detail, in particular in order to clarify whether such persons could be individuals, companies, governments or governmental agencies, domestic or foreign and existing or not at the time of assignment. It should be noted that, in some legal systems, in order to clearly distinguish the borrower under the financing contract (i.e. the assignor) from the debtor of the assigned receivables, the term "debtor" is used to indicate the former, and the term "obligor" to indicate the latter. In addition, it should be noted that, in securitization transactions, the term "originator" is often used to distinguish the initial assignor, i.e. the person in whose favour the receivables arose from the original transaction, from the subsequent assignor who assigns the receivables to a special purpose corporation, wholly owned by the subsequent assignor.

"Financing contract"

4. Paragraph (2) is intended at describing the financing contract in a broad and flexible way, so as to encompass a wide range of practices in which the assignee provides financial or other similar services. In addition, paragraph (2) is intended to cover both assignments that form an integral part of the financing contract (e.g. factoring) and assignments that are made pursuant to a distinct contract (e.g. project financing). The reference to the "assignor or another person" is aimed at covering the case in which the assignor might not be the borrower under the financing contract. While the reference to some financing contracts might be useful, to the extent that it is only indicative and non-exhaustive, it might be inappropriate in that it might be misread as being exhaustive or might appear to rely on artificial distinctions that are difficult to draw in practice.

5. An alternative approach might be to avoid defining the financing contract altogether, leaving its exact meaning to the parties and to the applicable national law. Such an approach, while inherently more flexible, might introduce uncertainty as to the scope of application of the draft uniform rules.

"Receivable"

6. Paragraph (3) has been revised in response to suggestions made at the previous session of the Working Group. The term "creditor" has been deleted since it might inadvertently result in restricting the range of persons cov-
7. The notion of the term “receivable” has been limited to contractual receivables. Under such an approach, receivables arising from a wide range of contracts would be covered (e.g. receivables arising from leases, licences and concession agreements, from which revenues for project financing transactions may often flow). However, receivables arising from torts, which might involve public policy considerations, would be left outside the scope of the text. The language inserted at the end of paragraph (3) is intended to highlight the question whether, in addition to tort receivables, other receivables would have to be excluded (e.g. receivables that are subject to special rules, such as those arising from an independent guarantee or a letter of credit).

8. The scope of the term “monetary sum” has been enlarged so as to include any currency and, possibly, commodities easily convertible into money (A/CN.9/420, para. 35). It might need to be further expanded in order to include monetary units of account. A reference to an index indicating prices of commodities at a particular time might need to be added, since the question whether a commodity would be “easily convertible to money” would depend on the market conditions at a particular time.

9. In order to avoid any uncertainty as to whether future receivables are covered by the draft uniform rules, an explicit reference to those receivables has been inserted in paragraph (3) (for a definition of “future receivables”, see paragraph (4)). In addition, a reference has been inserted to partial or undivided interests in receivables within square brackets in order to draw the attention of the Working Group to the question whether transactions, such as securitization of undivided interests in receivables, as well as loan participations or loan syndications, should be covered (A/CN.9/420, paras. 180-184).

10. Existing draft articles might need to be modified or new draft articles might need to be added, should partial and undivided interests in receivables be covered. For example, the debtor protection provisions might need to be strengthened by providing, e.g. that the debtor should not be required to pay a part of an undivided interest to the assignee and the rest to the assignor or to another assignee.

“Future receivable”

11. In view of the fact that the revised definition of the term “receivable” contains an explicit reference to future receivables, it might be advisable to define the term “future receivable”. At the previous session of the Working Group, some doubts had been expressed as to whether the draft uniform rules should recognize the entire range of future receivables. The Working Group noted that, in some legal systems, bulk assignments of “conditional” receivables (i.e. receivables that might arise subject to a future event that may or may not take place) and “purely hypothetical” receivables (e.g. receivables that might arise if a merchant is able to establish a business and to attract customers) might run counter to public policy considerations (A/CN.9/420, paras. 53-54).

12. In line with the decision taken by the Working Group, the text in paragraph (4) does not introduce any limitation with regard to the types of future receivables to be covered (A/CN.9/420, para. 55). Should the Working Group decide to limit the range of future receivables covered in the draft uniform rules, certain types of future receivables could be excluded in the definition of “receivable” (draft article 2(3)(b)), with the result that the draft uniform rules as a whole would not apply to such types of receivables. An alternative to that approach would be to introduce such a limitation in draft article 7 dealing with bulk assignments, with the result that only draft article 7 would not apply to bulk assignments of certain types of future receivables.

13. One difficulty in implementing a limitation would be to reach acceptable definitions of the receivables that might be excluded, such as “conditional and hypothetical” receivables. A possible solution might be found in a legal system that recognizes the validity of bulk assignments of future receivables only if the receivables arise within a specified period of time. An alternative approach for the consideration of the Working Group may be found in article 5.5 of the Model Law on Secured Transactions, prepared by the European Bank for Reconstruction and Development (EBRD), which provides that a “class charge”, i.e. a security interest in property that is not specifically identified, needs to be registered in order to be valid.

14. It should be noted, however, that introducing a limitation as to the types of “future” receivables to be covered in the text could substantially reduce the usefulness of the draft uniform rules for receivables financing. “Conditional” and “hypothetical” receivables are rather frequently assigned in bulk, even if, in view of the uncertainty as to whether they will ever arise, the amount of credit made available on their basis may be substantially lower than their nominal value. It should also be noted that under the Factoring Convention notification of the assignment of certain future receivables (i.e. receivables arising from contracts not existing at the time of notification) may not be validly given to the debtor (article 9(1)(e)).

“Consumer receivable”

15. The definition of “consumer receivable” in paragraph (5) was inspired by article 2(a) of the Sales Convention. The Working Group might wish to cover receivables arising from consumer transactions, in view of their importance in such transactions as securitization of credit card receivables. In order to address the concerns
related to consumer protection, the Working Group might wish to consider the following two alternative approaches, namely: either to leave the assignee-debtor relationship altogether, or only matters related to consumer protection, to the applicable national law, or to cover that relationship as well while strengthening the position of the consumer-debtor under the draft uniform rules (e.g. by excluding consumer receivables from the scope of draft articles 8 and 16).

“Writing”

16. A definition of the term “writing” would be useful in the context of the following articles: draft article 1(1), if oral assignments were to be excluded from the scope of the text; draft article 5, if oral assignments were to be ineffective towards any party or only towards third parties (Variant B); draft article 13(2)(a) providing for notification of the assignment in writing; and draft article 15 providing for the written consent of the assignee to modifications of the original contract. Paragraph (6) was inspired by article 7(2) of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995). Its main advantage is that it addresses the need for some form, while at the same time following a flexible approach so as to include modern means of communication.


“Place of business”

18. Paragraph (7), which is intended to apply throughout the draft uniform rules, follows a more flexible approach than the respective provision in the earlier draft (draft article 1(2)) in that it refers to the “relevant contract” (see article 2.2 of the Factoring Convention). The advantage of this formulation is that it results in applying the rule contained in paragraph (7) to all parties, i.e. to the assignee, to the financing contract, if any, and to the original contract. The Working Group might wish to consider adding in paragraph (7) a reference to the seat in order to cover companies which have no fixed place of business, e.g. post-office-box companies.

19. It may be noted that, if a registration-approach were to be adopted in draft article 18, it might be desirable to have a more precise designation of the place where notice of the assignment should be registered.

Article 3. International obligations of the [contracting] [enacting] State

Variant A This Convention does not prevail over any international agreement which has been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the assignor and the debtor have their places of business in States parties to such agreement.

Variant B The provisions of this Law apply subject to any agreement in force between this State and any other State or States.

References: A/CN.9/420, para. 23

Remarks:

Variant A, which would fit into a convention, is modelled on article 90 of the Sales Convention, while variant B, which could be included in a model law, was inspired by article 1(1) of the UNCCITRAL Model Law on International Commercial Arbitration.

Article 4. Principles of interpretation

(1) In the interpretation of this [Convention] [this Law], regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based [or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law].

References: A/CN.9/420, para. 190

Remarks:

1. Draft article 4 is modelled on article 7 of the Sales Convention. Paragraph (1) is intended to address the issue of the interpretation of the draft uniform rules. Paragraph (2) is aimed at addressing the question of gap-filling, which pursuant to a suggestion made at the previous session of the Working Group should be based on the substantive principles underlying the draft uniform rules rather than on conflict-of-laws rules (A/CN.9/420, para. 190).

2. It should be noted, however, that a different approach, followed in the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, might be to include conflict-of-laws rules and a rule on interpretation but not a provision on gap-filling. Another approach, which could be followed if the draft uniform rules were to take the form of a convention, might be to combine a rule on gap-filling along the lines of paragraph (2) and the conflict-of-laws rules (draft articles 21-23), with the result that gap-filling would have to be attempted on the basis of the substantive principles underlying the draft uniform rules before resort is sought to the conflict-of-laws rules.

3. The need for a provision along the lines of article 4 would be lesser, if the draft uniform rules were to take the form of a model law, since the law of the State enacting a model law would deal with such issues as interpretation and gap-filling. However, even in a model law, it might be worthwhile attempting to reach a uniform interpretation provision along the lines of draft article 4, with the exclusion of the bracketed language at the end of paragraph (2), which would not fit into a model law (see article 3 of the draft UNCCITRAL Model Law on EDI).
Chapter II. Form and content of assignment

Article 5. Form of assignment

Variant A

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.

Variant B

An assignment in a form other than in writing is not effective [towards third parties]

References: A/CN.9/420, paras. 75-79
A/CN.9/420, draft article 5

Remarks:

1. Variant A reproduces draft article 5 of the earlier draft of the rules, which was modelled on article 11 of the Sales Convention. The advantage of this approach is that it makes an assignee's right in the assigned receivables independent from formalities. In addition, such an approach would not prejudice the interests of the debtor to the extent that the debtor would be entitled, before notification, to pay the assignor and be discharged. Moreover, such an approach would not prejudice the interests of third parties, provided that a kind of a publicity system would be introduced (e.g. filing of a notice about the assignment in a public registry).

2. Variant B, which has been prepared in response to suggestions made at the previous session of the Working Group (A/CN.9/420, para. 78), provides that purely oral assignments do not produce effects towards any party, or only towards third parties. The exact content of variant B would depend on the determination of what constitutes a "writing" (see draft article 2(6)). In addition to the option presented in variant B, the Working Group might wish to consider whether to include a requirement of writing in the definition of assignment, thus excluding purely oral assignments from the scope of the draft uniform rules.

Article 6. Content of assignment

(1) Subject to the provisions of [this Convention] [this Law]:

(a) an assignment transfers to the assignee the right of the assignor to claim and to receive payment of the assigned receivables; and

(b) an assignment does not have any effect on the debtor's duty to pay other than to pay to the assignee.

(2) Without the debtor's consent, the assignment does not affect the obligations of the assignor arising from the original contract.

Remarks:

1. At the previous session of the Working Group, the view was expressed that the draft uniform rules should expressly state a principle of paramount importance for the protection of the debtor, namely that the debtor should not be disadvantaged as a result of the assignment (A/CN.9/420, para. 101). This fundamental principle is embodied in draft article 6, both in a positive way for the purpose of identifying, in the interest of all parties concerned, the content of the assignment, and in a negative way for the protection of the debtor in particular. Such a provision might alleviate the concerns expressed with regard to including within the scope of the draft uniform rules international assignments of domestic receivables (see draft article 1, remark 9).

2. Paragraph (2), which attempts to further clarify the content of the assignment, is not intended to invalidate other types of assignment, e.g. novation of obligations, or the assignment of a contract as a whole, which are outside the scope of the draft uniform rules.

Article 7. Bulk assignment and assignment of single receivables

(1) One or more, existing or future, receivables may be assigned.

(2) An assignment of one or more, existing or future, receivables that are not specified individually transfers the receivables, if they can be identified as receivables to which the assignment relates, either at the time of assignment or when the receivables become due or are earned by performance.

(3) An assignment of future (...) receivables transfers the receivables (...) directly to the assignee (...) , without the need for a new assignment.

References: A/CN.9/420, paras. 45-60
A/CN.9/420, draft article 3

Remarks:

"Bulk assignment"

1. The validity of bulk assignments of existing and future receivables, which are the most common ones in receivables financing practice, is questioned in some legal systems on several grounds, including that such assignments unduly restrict the economic autonomy of the assignor or that they are unfair to creditors in the context of the insolvency of the assignor. It is of great importance, therefore, to recognize the validity of both the agreement to assign and the resulting transfer of receivables (e.g. that a project finance borrower building and operating a toll road may validly assign all toll receipts in order to obtain financing needed for the project).

2. Paragraph (1) is aimed at recognizing the validity of bulk assignments and of assignments of single receivables, while paragraphs (2) and (3) are intended to ensure that such assignments result in the transfer of the assigned receivables. Under paragraph (2), the only condition of validity of the transfer is that the receivables may be identified to the assignment, either at the time of assignment or when they come into existence. In line with the definition of "future receivable" contained in draft article

References: NCN.9/420, paras. 75-79
2(4), the reference to the receivables coming into existence, which was contained in the earlier draft of paragraph (2), has been replaced by a reference to the receivables becoming due or being earned by performance. In addition, paragraph (2) deals with the question of the time at which future receivables are transferred.

3. Paragraph (3) is aimed at settling two questions, namely: the question whether future receivables are transferred directly to the assignee, which is of importance if the assignor becomes insolvent after the assignment but before the receivables come into existence; and the question whether a new assignment is required at the time when the receivables come into existence.

Article 8. No-assignment clauses

(1) Variant A (...) An assignment (...) transfers the receivables to the assignee (...) notwithstanding any agreement between the assignor and the debtor prohibiting or restricting such assignment (...). Nothing in this article (...) affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of (...) a no-assignment clause, but the assignee is not liable to the debtor for such a breach.

Variant B An agreement between the assignor and the debtor prohibiting or restricting assignment of receivables is invalid. An assignment transfers the receivables to the assignee notwithstanding such an agreement. Neither the assignor nor the assignee shall have any liability for breach of such an agreement.

(2) This article does not apply to the assignment of consumer receivables.

References: A/CN.9/420, paras. 61-68
A/CN.9/420, draft article 4

Remarks:

1. Draft article 8 is aimed at covering contractual but not statutory prohibitions of assignment. Variants A and B of paragraph (1) reflect two different approaches in favour of which support was expressed at the previous session of the Working Group (A/CN.9/420, paras. 62 and 67). Variant A is aimed at providing certainty as to the validity of an assignment made in breach of a no-assignment clause. In addition, variant A is intended to ensure that, while the debtor may recover from the assignor any damage suffered as a result of the assignment, it would not have that remedy against the assignee, since otherwise the assignment could be deprived of any value.

2. Variant B, inspired by article 9-318(4) of the United States Uniform Commercial Code ("UCC"), invalidates a no-assignment clause with the result that an assignment effected in breach of a no-assignment clause would be valid, while the violation of that clause would not give rise to any liability.

3. Paragraph (2) appears within square brackets pending determination of the approach the Working Group might decide to take with regard to consumer protection. It is intended to leave the validity and effectiveness of anti-assignment clauses contained in consumer contracts outside the scope of draft article 8. An alternative approach might be to explicitly subject the application of the draft uniform rules to the applicable consumer protection law, and in addition, to ensure that the position of the debtor-consumer is not unreasonably affected as a result of the assignment (e.g. by providing that in a consumer context, unless the parties agree otherwise, payment of the assigned receivables should always be made to the bank account designated by the assignor and the debtor). Such an approach would be consistent with existing practices (e.g. securitization of credit card receivables) and could ensure that the consumer-debtor could benefit from an increased access to lower cost credit.

4. The Working Group might wish to address the additional question whether an assignee should be able to take a valid assignment in case it has actual knowledge that it violates a prohibition between the assignor and a third party (e.g. a negative pledge by which a borrower undertakes towards a lender providing unsecured finance that the borrower will not create security over its assets in favour of any third party).

Article 9. Transfer of security rights

Unless otherwise provided by a rule of law or by an agreement between the assignor and the assignee, an assignment transfers to the assignee the rights securing the assigned receivables without a new act of transfer.

References: A/CN.9/420, paras. 69-74

Remarks:

Draft article 10 reflects a decision taken by the Working Group at its previous session that the draft uniform rules should adopt the principle of automatic transfer of security rights, subject to a contrary statutory or contractual provision (A/CN.9/420, para. 74). The Working Group might wish to consider the additional question whether only personal security rights (e.g. guarantees) or proprietary security rights as well (e.g. pledges, mortgages) should be covered in draft article 9.

Chapter III. Rights, obligations and defences

[Article 10. Determination of rights and obligations

(1) The rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules, general conditions or usages specifically referred to therein, and by the provisions of [this Convention] [this Law].

(2) The rights and obligations of the assignor and the debtor arising from the original contract are determined by the terms and conditions set forth in that contract,
including any rules, general conditions or usages specifically referred to therein, and by the provisions of [this Convention] [this Law].

(3) The priority between several assignees who obtained the receivables from the same assignor, as well as between the assignee and creditors of the assignor including, but not limited to, the administrator in the insolvency of the assignor, is determined, subject to the provisions applicable to the insolvency of the assignor, by the provisions of [this Convention] [this Law].

[(4) In interpreting the terms and conditions of the assignment, the underlying financing contract, if any, and the original contract and in settling questions that are not addressed by their terms and conditions or by the provisions of [this Convention] [this Law], regard shall be had to generally accepted international rules and usages of receivables financing practice.]

References: A/CN.9/420, paras. 73, 81, 95

Remarks:

1. In dealing only with some rights, obligations and defences of the parties (assignor, assignee, debtor and third parties), the earlier draft of the uniform rules was predicated on the assumption that, while the assignor and the assignee could determine their rights and obligations in their contract, the rights, obligations and defences of the debtor and priority among creditors laying a claim on the assigned receivables should be settled to a large extent by reference to rules of law. Draft article 10, which is a new provision, modelled on article 13 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, and appears within square brackets, attempts to explicitly state that understanding and to clarify the relationship between the draft uniform rules, other rules of law and party autonomy.

2. Paragraph (1) recognizes party autonomy with regard to the rights and obligations of the assignor and the assignee and it refers, in addition, to the provisions of the draft uniform rules dealing with the assignor-assignee relationship (e.g. draft articles 11, 12(2) and 21). Paragraph (1) generally refers to the agreement between the assignor and the assignee, without specifying whether that agreement is a distinct agreement or forms part of the underlying financing contract.

3. The reference to usages may be useful in that it codifies internationally acceptable contractual rules and usages governing receivables financing practice (e.g. the Code of International Factoring Customs promulgated by Factors Chain International). On the other hand, against such a reference, it could be argued that it might introduce uncertainty, since the term "generally accepted" might not be universally understood.

4. Paragraph (2), while recognizing party autonomy, subjects the determination of certain rights and obligations of the assignor and the debtor to the draft uniform rules (e.g. draft articles 13-17). By contrast, paragraph (3), which addresses the issue of priority among competing creditors laying a claim on the assigned receivables, refers to rules of law, since this matter involves the proprietary effects of assignment, a matter normally outside the purview of party autonomy. Paragraph (4) is aimed at settling questions left unaddressed both in the contract and in the draft uniform rules by reference to international contractual rules and usages.

5. Paragraph (4), which appears within distinct square brackets pending determination by the Working Group of the question of the retention or not of draft article 4(2) on gap-filling, might be more useful in a convention than in a model law which would be part of domestic law, which would normally include provisions on gap-filling. Should the Working Group tentatively decide in favour of preparing a convention and to retain a provision along the lines of draft article 4(2), paragraph (4) might be inconsistent with that provision and should be deleted, since the binding character of usages to which parties may have agreed and of practices which the parties may have established between themselves is foreseen in paragraphs (1) and (2) (see also article 9 of the Sales Convention).

Article 11. Warranties of the assignor

(1) Unless otherwise explicitly agreed between the assignor and the assignee (...), the assignor represents (...) that the assignor is, at the time of assignment, or will later be, the creditor, and that the debtor does not have (...), at the time of assignment, (...) defences (...) that would deprive the assigned receivables of value...

(2) Unless otherwise explicitly agreed between the assignor and the assignee (...), the assignor does not represent (...) that the debtor will perform its payment obligation under the original contract (...).

References: A/CN.9/420, paras. 80-88
A/CN.9/420, draft article 6

Remarks:

1. At its previous session, the Working Group recognized that, while the types of warranties given by the assignor to the assignee are a matter of contract, it was useful to include a default rule addressing the question of warranties in the absence of a relevant provision in the assignment (A/CN.9/420, para. 81).

2. Paragraph (1), which merges paragraphs (1) and (2) of the earlier draft, is intended to recognize party autonomy in the allocation of risks between the assignor and the assignee for defences of the debtor that are unknown to the assignee and, at the same time, to allocate that risk in the absence of agreement by the parties.

3. Paragraph (1) has been redrafted in order to address the concerns that: a variation of the warranty, in particular, by an implied agreement might run against good faith standards; the term "warranties" might introduce uncertainty; the words "in the contract of assignment" might be too restrictive; the words "to the assignee" might inadvertently lead to the conclusion that the warranty exists...
4. The term "represents" is used instead of the term "warrants" (A/CN.9/420, paras. 83). This term was drawn from article 45(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988; "the Bills and Notes Convention") dealing with the warranties given by the transferor of an instrument to the transferee. The words "or will later be" contained in paragraph (1) are aimed at ensuring that future receivables are covered. It should be noted that use of the verb "will" might inadvertently lead to the exclusion of "conditional and hypothetical" receivables, while replacing "will" with the term "might" might render this warranty unnecessary. Paragraph (2) reflects a warranty familiar in most legal systems.

5. The Working Group might wish to consider the additional question whether the consequences of breach of warranties should be dealt with in the draft uniform rules or should be left to other rules of law. The main question that might need to be addressed is whether a fundamental breach of warranties by the assignor would result in the automatic avoidance of the assignment and in the automatic transfer of the receivables back to the assignor, without a new act of transfer.

Article 12. Assignee's right to notify the debtor and to receive payment

(1) (...) Unless otherwise provided in the agreement between the assignor and the assignee, the assignee is entitled to notify the debtor pursuant to article 13 (...) and to request payment of the receivables assigned at the time agreed upon with the assignor and, in the absence of such an agreement, at any time.

(2) If the assignor fails to perform its obligation to pay (...) under the financing contract, the assignee is entitled to notify the debtor and to request payment.

(3) (...) If agreed by the assignor and the assignee or required by law:

(a) the assignee who receives payment from the debtor must account for any amount received in excess of the obligation secured by the assignment; and

(b) the assignor remains liable for any amount by which the payment received by the assignee from the debtor falls short of the obligation secured by the assignment.

References: A/CN.9/420, paras. 89-97
A/CN.9/420, draft article 7

Remarks:

1. The title of draft article 12 has been changed in order to correspond to its content (A/CN.9/420, paras. 97). Paragraph (1) is intended to reflect the freedom of contract of the parties to define the terms of their contract, including the point of time when the right to notify the debtor and to collect the proceeds of the receivables would be triggered other than upon a breach of the financing contract by the assignor, which is dealt with in paragraph (2). The reference to "default" in paragraph (1) has been replaced by a reference to "failure of performance" for consistency with the terminology used in the Sales Convention. The wording added at the end of paragraph (1) is intended to clarify that the assignee does not merely have a right to notify the debtor but mainly to collect the proceeds of the receivables (A/CN.9/420, paras. 93-94) and that, in the absence of agreement between the assignor and the assignee as to the time of notification, the assignee has the right to notify the debtor and to request payment at any time.

2. Under the current formulation of paragraph (1), the assignee may validly notify the debtor before the breach of the financing contract occurs. The assignee might have a legitimate interest in notifying the debtor and receiving payment before breach of the financing contract occurs, even if such notification was not foreseen in the contract (e.g. in case of problems with the assignor short of a cessation of payments).

3. Under paragraph (2), the assignee is not bound by any agreement with the assignor as to if or when to notify the debtor, since in case of failure on the part of the assignor in the performance of the financing contract the assignee has an interest in acting promptly to collect the assigned receivables in payment of the obligation secured.

4. In line with the position taken by the Working Group at its previous session that it might be inappropriate to draw a distinction between assignments by way of sale and assignments by way of security, paragraph (3) refers instead to accounting by the assignee to the assignor if agreed or required by law, thus leaving that distinction to the parties and to other rules of law (A/CN.9/420, paras. 95-97).

Article 13. 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:

(a) the debtor receives (...) notification in writing of the assignment by the assignor or by the assignee (...);

(b) the notification contains an unequivocal request for payment and reasonably identifies the receivables assigned, whether existing or future at the time of notification, and the person (...) to whom or for whose account the debtor is required to make payment, and
(c) the debtor has not received notification in writing of a prior assignment, or of measures aimed at attaching the assigned receivables, including but not limited to judgements or orders issued by judicial or non-judicial bodies, as well as of measures effected by operation of law, in particular in case of insolvency of the assignor.

(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) In case the debtor receives notifications of more than one assignment of the same receivables made by the same assignor, the debtor is discharged from liability by payment to the first assignee to notify in accordance with paragraph (2) of this article and has against the assignee the defences provided for under article 14.

(...)

(5) Irrespective of any other ground on which payment by the debtor to the assignee discharges the debtor from liability, payment by the debtor to the assignee discharges the debtor from liability if made in accordance with this article (...).

References: A/CN.9/420, paras. 98-131
A/CN.9/420, draft articles 9 and 15(2)

Remarks:

1. At the previous session of the Working Group, the concern was expressed that the rule in paragraph (1) failed to establish an appropriate balance between the need for certainty (which would be served by an objective fact for triggering the debtor’s duty to pay the assignee, such as notification) and regard for ethical conduct of the parties (which would be served if paragraph (1) were also to introduce a substantive fact, such as knowledge of the assignment by the debtor, A/CN.9/420, paras. 99-104). In order to address that concern, the Working Group might wish to limit the rule embodied in paragraph (1) by a specific reference to provisions of law relating to fraud. It may be noted, however, that such a limitation would be implicit in the draft uniform rules in view of the public policy considerations involved in rules on fraud and of the reference to the need to observe good faith in international trade contained in draft article 4.

2. Paragraph (2) has been revised in order to address the observations and suggestions made at the previous session of the Working Group (A/CN.9/420, paras. 111-123). Under subparagraph (a), the assignee may notify independently of the assignor, while the debtor may request pursuant to paragraph (3) additional information if there is doubt as to whether the assignee is indeed the rightful creditor. However, if the debtor does not request additional information and it is later established that the assignee did not have a right in the receivables, the debtor is exposed to the risk of having to pay twice.

3. Additional language has been inserted in subparagraph (b) in order to ensure that notification relating to future receivables may be given validly (A/CN.9/420, para. 125). The Working Group might wish to consider additional questions, including the questions: whether, in case of several and joint debtors, notification of one or all of them should be required; and whether a mistake in the notification should invalidate it despite the fact that the debtor readily understood which receivables had been assigned and to whom the debtor was supposed to pay.

4. Paragraph (4) in the earlier draft has been moved to draft article 2(6) in view of the need to define “writing” for the purposes of draft articles 5, Variant B, 13 and 15. Paragraph (5) in the earlier draft has been deleted as being superfluous, since the form and the minimum content of the notification is currently being described in paragraph (2).

5. In response to a suggestion made at the previous session of the Working Group that the draft provisions dealing with multiple notifications should be aligned or consolidated, draft article 15(2) in the earlier draft has been moved to paragraph (4) of draft article 13 (A/CN.9/420, para. 169).

6. The new wording, which has been inserted in paragraph (5) in the earlier draft, in order to address a concern expressed at the previous session of the Working Group, was drawn from article 9(2) of the Factoring Convention (A/CN.9/420, paras. 129-131). It is intended to ensure that draft article 13 does not inadvertently result in the exclusion of grounds for discharge of the debtor that might exist under other rules of law. This approach is consistent both with the need to protect the debtor paying the assignee and the need to facilitate assignment by encouraging payment to the assignee.

Article 14. Defences and set-offs 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) The debtor may assert against the assignee any right of set-off in respect of claims existing against the assignor in whose favour the receivable arose [or claims existing against the assignee] and available to the debtor at the time notification of assignment conforming to paragraph (2) of article 13 was given to the debtor.

(3) Notwithstanding paragraphs (1) and (2), defences and set-offs 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.

References: A/CN.9/420, paras. 132-151
A/CN.9/420, article 10

Remarks:

1. The order of paragraphs (2) and (3) of the earlier draft has been reversed and the scope of new paragraph (3) has
been expanded to cover both defences and set-offs. This was done in order to ensure that the debtor would not be able to raise the breach of a no-assignment clause against an assignee either as a defence or as an independent claim on grounds such as interference with contract rights. In paragraph (2), a reference has been inserted within square brackets for the consideration of the Working Group to defences that the debtor might have against the assignee based on separate dealings between the debtor and the assignee. Paragraph (3) has been placed within square brackets pending a decision of the Working Group on no-assignment clauses (draft article 8).

2. The Working Group might wish to consider the question whether the words “all defences” includes a defence based on a misrepresentation made before the conclusion of the original contract and a defence based on a contract which modified the original contract (for modifications of the original contract, see draft article 15).

Article 15. Modification of the original contract

A modification of or a [substitution for] [novation of] the original contract shall be binding on the assignee and the assignee shall acquire corresponding rights under the modified or new contract, provided that it is foreseen in the agreement between the assignor and the assignee or is later consented to by the assignee in writing.

Remarks:

1. Draft article 15 sets forth a new provision inserted pursuant to a suggestion made at the previous session of the Working Group to consider the extent to which the assignee should be bound by modifications in the original contract agreed upon by the assignor and the debtor after the conclusion of the assignment, or even after notification of the assignee; see article 30 of the Bills and Notes Convention.

2. The Working Group might wish to consider limiting the scope of draft article 15 to cases in which a modification would not be valid towards the assignee based on separate dealings between the debtor and the assignee. Paragraph (3) has been placed within square brackets pending a decision of the Working Group on no-assignment clauses (draft article 8).

3. The Working Group might wish to consider limiting the scope of draft article 15 to cases in which a modification would be necessary to avoid frustration of the assignee based on reasonable commercial standards.

Article 16. Waiver of defences

(1) For the purposes of this article a waiver of defences is an explicit written agreement by the debtor with the assignor or the assignee according to which the debtor undertakes not to assert against the assignee the defences that could raise under article 14.

(2) A waiver of defences, (...) made at the time of the conclusion of the original contract or thereafter, shall (...) preclude the debtor from asserting defences (...) the availability of which the debtor knew or ought to have known at the time of waiver.

(3) The following defences may not be waived:

(a) defences arising from separate dealings between the debtor and the assignee;

(b) defences arising from fraudulent acts on the part of the assignee;

(c) defences arising from separate dealings between the debtor and the assignor, or even after notification, provided that it is foreseen in the agreement between the assignee and the assignor or is later consented to by the assignee in writing.

(4) A waiver of defences may only be revoked by an explicit written agreement.

(5) A written and explicit indication of consent of the debtor to the assignment after notification is deemed to be a waiver of defences.

(6) The provisions of this article shall not apply to assignments of consumer receivables.

References: ACN.9/420, 136-144

ACN.9/420, draft article 11

Remarks:

1. The term “waiver of defences” is defined in paragraph (1) in order to avoid introducing uncertainty as to its meaning. The Working Group might wish to clarify that a waiver may be agreed, before notification, between the debtor and the assignor and, after notification, between the debtor and the assignee.

2. The first set of words underlined in paragraph (2) is aimed at implementing a suggestion made at the previous session of the Working Group (ACN.9/420, para. 138). The second set of words underlined is intended to describe the result of a waiver without using the terms “valid”, “effective”, or “enforceable”, the meaning of which might not be universally understood. In paragraph (3), further defences that may not be waived could be listed (see article 30 of the Bills and Notes Convention).

3. Paragraph (5), which has been inserted pursuant to a suggestion made at the previous session of the Working Group, provides for an implied waiver of defences in case of acceptance of the assignment by the debtor. It appears within square brackets, since it might be inconsistent with the principle embodied in paragraph (1) that, in order to protect the debtor from unintentionally waiving defences, any waiver of defences should be explicit. Paragraph (6) also appears within square brackets pending determination of the approach the Working Group might wish to take with regard to consumer receivables.
Article 17. Recovery of advances

(1) Without prejudice to the debtor's rights under article 14, failure of the assignor to perform (...) the original contract (...) does not entitle the debtor to recover a sum paid by the debtor to the assignee (...).

(2) An assignment shall not prejudice the debtor's rights against the assignor arising from the failure of the assignor to perform the original contract including, but not limited to the right of the debtor to recover from the assignor sums paid by the debtor to the assignee.

References: A/6CN.9/420, paras. 145-148
A/6CN.9/420, draft article 12

Paragraph (1) is aimed at ensuring that the debtor bears the risk of non-performance of the obligations of its contractual partner, i.e. the assignor, while preserving the defences that the debtor may assert against the assignee under draft article 14. Paragraph (2), inserted pursuant to a suggestion made at the previous session of the Working Group, is intended to preserve the rights of the debtor against the assignor for breach of the original contract, in particular the right to recover from the assignor advance payments made by the debtor to the assignee.

Article 18. Priority

(1) Where a receivable is assigned by the assignor to several assignees, the first assignee [the first assignee to notify the debtor pursuant to article 13] [the first assignee to register the assignment] has priority.

(2) The assignee has priority over creditors of the assignor, provided that [the assignment] [notification of the debtor] [registration of the assignment] occurred prior to the date at which the creditors of the assignor acquired a right in the assigned receivables.

(3) In case of insolvency of the assignor, the assignee has priority over the insolvency administrator, provided that [the assignment] [notification of the debtor] [registration of the assignment] occurred before the effective date of the insolvency proceedings.

(4) [Without prejudice to other rules of law relating to priority], the preceding paragraphs shall not apply in the following cases: [...]]

(5) The assignee may register at a public register in the location of the assignor a summary statement, which reasonably identifies the assignor, the assignees, the assigned receivables and the secured obligation, if any. In the absence of registration, [the first assignee] [the first assignee to notify the debtor] has priority, subject to paragraphs (2) and (3) of this article.

(6) For the purposes of this article, priority means the right of a person to satisfy its claim against the assignor on the basis of the assigned receivables in preference to other persons.

(7) Nothing in this article affects any provisions applicable to the insolvency of the assignor.

References: A/6CN.9/420, paras. 149-164
A/6CN.9/420, draft article 14

Remarks:

1. Uncertainty with regard to priority constitutes an important obstacle to receivables financing since creditors may withhold credit or make credit available at a higher cost, if they are not certain that they will be accorded priority, in particular in case of insolvency of the assignor. Draft article 18 is, therefore, of paramount importance for a text aimed at increasing the availability of credit.

2. Variants A, B and C of the earlier draft have been consolidated in paragraphs (1) to (3). The rule originally presented in variant D has been included in chapter V dealing with conflict-of-laws issues (draft article 23). Paragraphs (1) to (3) deal with different conflicts of priority. Paragraph (1) deals with conflicts of priority between several assignees of the same assignor ("dual assignments"). The Working Group felt that such dual, whether fraudulent or unconscionable, assignments should be dealt with separately from successive assignments by the initial or any subsequent assignee, since they essentially raise an issue of priority or validity (A/CN.9/420, para. 167). Paragraph (2) deals with conflicts between the assignee and the assignor's creditors attaching the assigned receivables, while paragraph (3) deals with conflicts between the assignee and the administrator in the insolvency of the assignor.

3. It should be noted that a priority rule based on notification of the debtor would be unsuitable in bulk assignments of existing and future receivables, taking place, e.g. in securitization of consumer credit card receivables, since, for cost and time reasons, the assignee could not possibly notify the hundreds or thousands of debtors often involved in such assignments, even if their identity were known.

4. The Working Group might wish to address the additional question whether an assignee who has actual knowledge of an earlier unnotified or unregistered assignment should obtain priority by notifying or by registering first (for a discussion of the question notification vs. knowledge in the context of the provision dealing with the debtor's duty to pay, see A/6CN.9/420, paras. 99-104). In determining which approach to follow, the Working Group might wish to weigh the need for certainty against the need to preserve acceptable standards of conduct in practice.

5. Paragraph (4) (paragraph (2) in the earlier draft) has been placed within square brackets pursuant to the concerns expressed at the previous session of the Working Group that a general exception to the priority rule in paragraph (1) could compromise the certainty of such a priority rule and thus have an adverse impact on the cost of credit (A/6CN.9/420, paras. 161-164). The Working Group might wish to consider alternative ways in which competing claims of suppliers of the assignor and assignees providing finance to the assignor might be addressed.

6. Paragraph (5), which appears within square brackets pending consideration by the Working Group of the pri-
priority rule in paragraphs (1) to (3), supplements a regime based on registration by providing a priority rule to cover the case in which there may be unregistered assignments (A/CN.9/420, para. 157).

7. Compared with the earlier draft, a more flexible approach is followed in paragraph (5) with regard to the determination of the place where the assignee needs to register, in that reference is made to the location, and not to the place of business, of the assignor. Should that approach be preferred, consideration should be given to the question whether the assignor would be considered as being located in the State where it is organized, or in the State where its executive offices or its principal assets are located. If either of the last two alternatives were chosen, the issue of a change in the location of the assignor would need to be addressed.

8. If the Working Group were to follow a registration-based approach, additional provisions would be needed, depending on whether a convention or a model law would be preferred. If the draft uniform rules were to take the form of a convention, reference could be made in the convention to existing registries, e.g. companies registries, possibly linked internationally with an electronic system of communications, or to an international registry that would need to be established.

9. Issues relating to the operation of the register, such as authentication of documents and liability of the registrar, would, in the former case, have to be left to the law of the State where registration occurs, while, in the latter case, they would need to be addressed in the convention. If a model law were to be preferred, a comment would need to be added that States wishing to adopt the model law would need to establish registration requirements and registers as they may consider appropriate (for general arguments in favour of a convention or a model law, see article 1, remarks 15-17).

10. In view of the wide divergences existing among the various legal systems with regard to the rights of secured and unsecured creditors, it might be difficult to achieve consensus on the detailed meaning of the term "priority". However, it might be useful to attempt to describe priority in a generic way along the lines set out in paragraph (6). As presently drafted, paragraph (6) would apply to draft article 18 only. If the reference to priority were to be retained in draft articles 10(3) and 23, the definition of the term "priority" would have made to apply to these provisions as well.

11. Paragraph (7) is by no means a final resolution of the problem of the relationship between the draft uniform rules and the provisions applicable to the insolvency of the assignor (whether contained in an insolvency code or in any other body of law), but is intended to raise the question of the relationship of the draft uniform rules and the provisions applicable to the insolvency of the assignor for the consideration of the Working Group. It should also be noted that the scope of the rule in paragraph (7) might need to be expanded in order to apply to the draft uniform rules as a whole.

Article 19. Payment to a specified bank account and priority

(1) If agreed between the assignor and the debtor before notification of the assignment pursuant to paragraph (2) of article 13, the debtor is entitled to pay into a bank account or a post office box specified in the agreement and be discharged from liability. After notification of the assignment pursuant to paragraph (2) of article 13, the debtor and the assignee may agree on the method of payment.

(2) In case of an agreement between the assignor and the debtor pursuant to paragraph (1) of this article, the person in control of the bank account or the post office box specified in the agreement for the purpose of payment by the debtor has priority.

References: A/CN.9.420, paras. 65, 92 and 183
Remarks:
1. At the previous session of the Working Group, reference was made to contractual arrangements pursuant to which the debtor may be required to continue making payments to a bank account or to a post office box designated by the assignor, even after the assignment or the notification of the debtor. Draft article 19 is intended to codify such an arrangement.

2. Such an approach presents a number of advantages, including: that the assignor may assign its receivables in order to obtain credit without the assignment being published, since the assignor and the assignee may negotiate among themselves the issue of the control over the bank account or the post office box; that the assignment does not necessarily change the position of the debtor; and that it might provide a simple and clear solution to the issue of priority.

3. On the other hand, such an approach has certain drawbacks, including: that the assignee could not determine certain matters related to the bank account, e.g. the bank with which the account is to be held or the type of the account, which might have an impact on the interest rate to be applied; the assignor would need to obtain control of the bank account or post office box before, e.g. the effective date of the insolvency of the assignor, in order to be protected; and the entity with which the account might be held might be exposed to the risk of being sued as an "agent" of the assignor or the assignee.

Chapter IV. Subsequent assignments

Article 20. Subsequent assignments

(1) [This Convention] [This Law] applies to any assignment (...) by the initial or any other assignee to subsequent assignees, provided that [the initial] [such] assignment is governed by [this Convention] [this Law].

(2) (...) [This Convention] [this Law] (...) applies as if the subsequent assignee were the initial assignee. However, the debtor may not assert against a subsequent
assignee rights of set-off in respect of claims existing against an earlier assignee, with the exception of rights existing against the penultimate assignee who is the ultimate assignor.

(3) Variant A A subsequent assignment of receivables (…) transfers the receivables to the assignee notwithstanding any agreement (…) prohibiting or restricting such assignment (…). Nothing in this paragraph affects any obligation or liability of a subsequent assignee for breach of a no-assignment clause.

Variant B An agreement (…) prohibiting or restricting assignment of receivables is invalid. An assignment of a receivable transfers the receivables to the assignee notwithstanding such an agreement. Neither an assignor nor an assignee have any liability for breach of such an agreement.

(4) Notwithstanding that the invalidity of an intermediate assignment renders all subsequent assignments invalid, the debtor may pay the first assignee to notify pursuant to paragraph (2) of article 13 and be discharged from liability.

References: A/CN.9/420, paras. 188-195 A/CN.9/420, draft article 15

Remarks:

1. In response to a view, which was widely shared at the previous session of the Working Group, draft article 20 has been revised so as to apply exclusively to successive assignments by the initial or any subsequent assignee and not to dual assignments by the assignor as well (A/CN.9/420, para. 167). Draft articles 13(4) and 18(1) should be sufficient in dealing respectively with multiple notifications of fraudulent or unexceptional dual assignments and with the issue of priority among several assignees who obtained the receivables from the same assignor.

2. It should be noted that it may be necessary to clarify that the initial assignment in securitization transactions is the assignment from the party in whose favour the receivables arose from the original contract. Otherwise, the reference to the “initial” assignment may be misread as indicating the assignment between affiliated companies in the same State and in which the draft uniform rules would not apply, if domestic receivables are involved. As a result of the reference to the draft uniform rules as a whole in paragraph (2), the subsequent assignee would have to follow the same procedure as the initial assignee in order to establish priority (A/CN.9/420, para. 172).

3. The language added at the end of paragraph (2) is intended to reflect a suggestion made at the previous session of the Working Group (A/CN.9/420, para. 171). It may be noted that, if that language were to be retained, the legal position of the debtor would be improved as a result of the assignment in that the debtor would have against the assignor pursuant to draft article 14(2), but also the rights existing against the penultimate assignee. In such a case draft article 6(1)(b) embodying the principle that assignment should neither worsen nor improve the debtor’s legal position would need to be revised.

4. The variants presented in the context of draft article 8 with regard to no-assignment clauses are reproduced in paragraph (3) with the necessary adjustments. Paragraph (4) is aimed at ensuring that the invalidity of an assignment in a chain of assignments does not affect the certainty necessary for the debtor to pay and discharge its obligation.

5. The Working Group might wish to consider inserting in draft article 20 a provision along the lines of article 11(2) of the Factoring Convention, which is intended to address the uncertainty in international factoring as to whether notification of the assignment by the export factor to the import factor constitutes also notification of the assignment by the assignor to the export factor.

(Chapter V. Conflict of laws)

The conflict-of-laws provisions contained in document A/CN.9/412 have been revised in view of the deliberations of the Working Group at its previous session (A/CN.9/420, paras. 183-201). They appear within square brackets pending determination by the Working Group of a number of questions, including: the question whether the text being prepared should take the form of a convention or a model law; and the question whether the scope of the conflict-of-law provisions should be the same as the scope of the substantive-law provisions or wider, as in the Convention on Independent Guarantees and Stand-by Letters of Credit (article 1(3)). With regard to the decision of the Commission for a closer cooperation with the Hague Conference on Private International Law on the conflict-of-laws aspects of assignment, the Working Group might wish to consider ways in which such cooperation could take place (e.g., the holding of joint meetings of experts on issues of common interest related to assignment of receivables).2

Article 21. Law applicable to the relationship between assignor and assignee

(1) With the exception of matters which are settled in this Convention (…), the transfer of a receivable as between the assignor and the assignee is governed by the law governing the receivable to which the assignment relates.

(2) With the exception of matters which are settled in this Convention (…), the relationship between the assignor and the assignee, including, but not limited to, the validity of the assignment (…) is governed by the law (expressly) chosen by the assignor and the assignee (…).

(3) In the absence of a [valid] [express] choice (...), the relationship between the assignor and the assignee (...), including, but not limited to, the validity of the assignment, to the extent that it is not settled in this Convention, is governed by [the law of the State in which the assignor has its place of business] [by the law of the country with which the assignment is most closely connected].

(4) Unless the assignment is clearly more closely connected with another country, it is deemed to be most closely connected with the country where the party who is to effect the performance which is characteristic of the assignment has, at the time of conclusion of the assignment, its place of business.

References: A/CN.9/420, paras. 188-196
A/CN.9/420, draft article 8
Remarks:

1. Paragraph (1) is intended to distinguish between the contractual effects of assignment, which could be governed by the law chosen by the assignor and the assignee, and the proprietary effects of assignment, which should be beyond the purview of party autonomy. Paragraph (1) is based on the principle that the transfer of a receivable should be governed by the same law under which that receivable came into existence in the first place. The word "expressly" in paragraph (1) of article 8 of the earlier draft has been deleted, since pursuant to draft article 4 issues that are not "expressly" addressed in the rules are to be settled by reference to the principles underlying the draft uniform rules.

2. The reference to the "rights and obligations" of the assignor and the assignee in paragraph (2) has been replaced by a more general reference to "the relationship between the assignor and the assignee". It should be noted that the Convention on the Law Applicable to Contractual Obligations (Rome, 1980; "the Rome Convention") refers to the "mutual obligations of assignor and assignee under a voluntary assignment", and does not address the question of the transfer of receivables (article 11). In paragraph (2), a choice has to be made between express and implied choice of law by the parties.

3. Paragraph (3) presents two alternatives, one based on the place of business of the assignor, which is aimed at ensuring certainty, and another, more flexible one based on the country with which the assignment is "most closely connected", which was drawn from article 4 of the Rome Convention. It should be noted that the Rome Convention refers to the law of a "country" rather than to the law of a "State".

Article 22. Law applicable to the relationship between assignee and debtor

With the exception of matters which are settled in this Convention, (...) the relationship between the assignee and the debtor, including, but not limited to, the right of the assignee to notify the debtor and to receive payment, the duty of the debtor to pay the assignee and be discharged from liability and the defences of the debtor to-
at the time of even a bulk assignment; and that it would be suitable even to legal systems where registration is practised (assignees would normally look to the place of business of the assignor to ascertain the status of receivables). In addition, such an approach would have the advantage that it would result in the application of the law that would govern the insolvency proceedings of the assignor, if those proceedings were opened in the State of the assignor’s place of business or in a State that would have adopted the draft uniform rules.

3. The main disadvantage of an approach based on the place of business of the assignor is that priorities may be characterized variously, as issues of contract, tort, property, insolvency, or procedural law, and thus may be subject to other applicable law, which would most likely be the law of the country in which enforcement is sought. The problem of characterization may be overcome somewhat if the law of the country where the debtor has its place of business were applicable, since it would tend to be the law of the country where enforcement could be sought. It should be noted, however, that even the country of the debtor’s place of business would not provide a solution that would cover all cases (e.g. cases in which enforcement was sought in the country in which the insolvency of the assignor is opened, or in which enforcement was sought in a country where assets of the debtor are located).


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INTRODUCTION

1. At the current session, the Working Group on International Contract Practices continued its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), on the preparation of a uniform law on assignment in receivables financing. That was the third session devoted to the preparation of that uniform law, tentatively entitled the draft Convention on Assignment in Receivables Financing.

2. The Commission's decision to undertake work on assignment in receivables financing was taken in response to suggestions made to it in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York in conjunction with the twenty-fifth session, 17-21 May 1992). A related suggestion made at the Congress was for the Commission to resume its work on security interests in general, which the Commission at its thirteenth session (New York, 14-25 July 1980) had decided to defer for a later stage.

3. At its twenty-sixth to twenty-eighth sessions (1993 to 1995), the Commission discussed three reports prepared by the Secretariat concerning certain legal problems in the area of assignment of receivables (A/CN.9/376/Add.3, A/CN.9/397 and A/CN.9/412). Having considered those reports, the Commission concluded that it would be both desirable and feasible 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 as to the effects of such assignments on the debtor and other third parties.

4. At its twenty-fourth session, the Working Group commenced its work by considering a number of preliminary draft uniform rules contained in a report of the Secretary-General entitled "Discussion and preliminary draft of uniform rules" (A/CN.9/412). At that session, the Working Group was urged to strive for a legal text aimed at increasing the availability of lower cost credit (A/CN.9/420, para. 16).

5. At its twenty-fifth session, the deliberations of the Working Group were based on a note prepared by the Secretariat, which contained provisions on a variety of issues, including form and content of assignment, rights and obligations of the assignor, the assignee, the debtor and other third parties, subsequent assignments and conflict-of-laws issues (A/CN.9/WG.II/WP.87).

6. The Working Group, which was composed of all States members of the Commission, held the current session at Vienna from 11 to 22 November 1996. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, Chile, China, Ecuador, Egypt, Finland, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Poland, Russian Federation, Singapore, Slovakia, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

7. The session was attended by observers from the following States: Belarus, Cambodia, Greece, Indonesia, Ireland, Israel, Lebanon, Morocco, Pakistan, Qatar, Republic of Korea, Romania, Sweden, Switzerland, Syrian Arab Republic, Turkey and Venezuela.

8. The session was attended by observers from the following international organizations: Cairo Regional Centre for International Commercial Arbitration, Commercial Finance Association (CFA), Hague Conference on Private International Law, Fédération Bancaire de l'Union Européenne, Federación Latinoamericana de Bancos (FELABAN) and Interamerican Bar Association (IABA).
9. The Working Group elected the following officers:
   
   **Chairman**: Mr. David Morán Bovio (Spain)
   
   **Rapporteur**: Mr. Ross Masud (Pakistan)


11. The Working Group adopted the following provisional agenda:
   1. Election of officers
   2. Adoption of the agenda
   3. Assignment in receivables financing
   4. Other business
   5. Adoption of the report.

12. The Working Group discussed draft articles 1 to 23 of the draft Convention on Assignment in Receivables Financing as set forth in the note prepared by the Secretariat (A/CN.9/WG.II/WP.89).

13. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in chapter III. The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 1 to 23, as well as of the other articles of the draft Convention.

II. DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

A. Title

14. Differing views were expressed with respect to the reference to the "financing" purpose of the assignment in the title of the draft Convention. One view was that such a reference should be deleted in view of the decision made by the Working Group at its previous session not to define the substantive scope of the draft Convention by reference to the purpose of the assignment (see A/CN.9/432, paras. 16-18). Another view was that the title should broadly reflect the economic nature of the transactions intended to be covered by the draft Convention, namely assignments made for securing credit. It was recalled that, although the scope of the draft Convention was defined broadly under draft article 1, it was subject to a number of exceptions, currently listed in draft article 2. After discussion, the Working Group decided that the title of the draft Convention was generally acceptable. It was widely felt, however, that the discussion might need to be reopened after the Working Group had completed its review of the substantive provisions of the draft Convention.

B. Preamble

15. The text of the preamble as considered by the Working Group was as follows:

   "The Contracting States,

   "Considering that international trade cooperation on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

   "Being of the opinion that the adoption of uniform rules governing assignments in receivables financing would facilitate the development of international trade and would promote commercial [and consumer] credit at more affordable rates,

   "Have agreed as follows:"

16. The Working Group found the substance of the preamble to be generally acceptable. As a matter of drafting, various suggestions were made. One suggestion was that the words "commercial [and consumer] credit" should be replaced by a simple reference to "credit". After discussion, that suggestion was adopted by the Working Group. Another suggestion was that the words "at more affordable rates" were unnecessary and should be deleted. It was generally felt, however, that the availability of more favourable rates of interest was an important practical benefit expected from the draft Convention, which should be reflected in the preamble.

C. Consideration of draft articles

   **Chapter I. Scope of application and general provisions**

   **Article 1. Scope of application**

17. The text of draft article 1 as considered by the Working Group was as follows:

   "(1) This Convention applies to assignments of international receivables and to international assignments of receivables, if

   "(a) [the assignor and the debtor have their places of business] [the assignor has its place of business] in a Contracting State; or

   "(b) the rules of private international law lead to the application of the law of a Contracting State].

   "(2) A receivable is international if the places of business of the assignor and the debtor are in different States. An assignment is international if the places of business of the assignor and the assignee are in different States.

   "(3) If a party has more than one place of business, the place of business is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the
time of the conclusion of that contract. If a party does not have a place of business, reference is to be made to its habitual residence."

Paragraph (1)

Opening words

18. With respect to the substantive scope of application of the draft Convention, it was noted that the opening words of draft article 1 reflected the decision made by the Working Group at its previous session not to limit the scope of the draft Convention by reference to the "financing" or "commercial" purpose of the assignment (ACN/9/432, paras. 16-18). It was also noted that the opening words of draft article 1 reflected the decision made by the Working Group at its previous session that the scope of the draft Convention should be broadly drafted to cover both assignments of international receivables and international assignments of domestic receivables, thus excluding only domestic assignments of domestic receivables (ACN/9/432, para. 24). The Working Group confirmed those two decisions by adopting the opening words of paragraph (1) unchanged.

Subparagraph (a)

19. Various views were expressed as to whether the places of business of the assignor, the assignee and the debtor should constitute relevant connecting factors for determining the applicability of the draft Convention to any given factual situation.

20. Under one view, the draft Convention should apply to all situations where the assignor had its place of business in a contracting State, with the exception of situations in which the debtor's interests were at stake and to which the draft Convention should apply only if the debtor too had its place of business in a contracting State. It was stated that retaining such a connecting factor would ensure both the broad applicability of the draft Convention and a sufficient level of certainty and predictability for all interested parties as to the circumstances under which the draft Convention would become applicable. In that connection, it was suggested that paragraph (1) of draft article 1 should be replaced by the following provisions:

"(1) Except as provided in paragraph (2), this Convention applies to assignments of international receivables and to international assignments of receivables if the assignor has its place of business in a Contracting State [at the time of assignment]."

"(2) Notwithstanding paragraph (1), this Convention does not govern the rights and obligations of the debtor [with respect to the assignor or the assignee] unless either:

"(a) the debtor has its place of business in a Contracting State [at the time the original contract is concluded or, if there is no original contract, at the time the receivable otherwise arises]; or

"(b) the rules of private international law lead to the application of the law of a Contracting State to determine the rights and obligations of the debtor under the original contract."

21. Support was expressed in favour of retaining the place of business of the assignor as the only connecting factor, in view of the fact that the assignor would, in most instances, be a party to the dispute situations that the draft Convention was designed to address. It was generally felt, however, that the proposed text would result in excessively broadening the scope of the draft Convention. While the Working Group did not adopt the suggested text, it was generally agreed that the reference to the time of assignment was a useful element, which should be reflected in paragraph (2) (see paragraphs 27-31, below).

22. Another view was that the draft Convention should be applicable only where the assignor, the assignee and the debtor had their places of business in a contracting State. It was stated that, unless all interested parties had their places of business in a contracting State, the draft Convention might inappropriately cover situations where, under applicable rules of private international law, the law governing the assignment would be the law of a non-contracting State. While support was expressed in favour of that view, it was generally felt that retaining such a connecting factor might unduly narrow the scope of the draft Convention. In the discussion, the view was expressed that the right of the parties to opt out of the draft Convention by choosing the law of a non-contracting State needed to be further examined.

23. The prevailing view was that the draft Convention should be applicable where both the assignor and the assignee had their places of business in a contracting State. It was generally felt that, since the debtor was not a party to the assignment, and since the provisions of the draft Convention were intended not to change the legal position of the debtor, the place of business of the debtor should not be regarded as a relevant connecting factor for determining the applicability of the draft Convention. Concerns were expressed, however, as to practical difficulties that might arise from the need to determine the place of business of the assignor. For example, it was stated that, where an assignor assigned certain receivables to a syndicate of assignees, it might be difficult to determine whether all the assignees had their places of business in a contracting State. A question was also raised as to how the issue of conflicts of priority might be solved where a receivable had been assigned to a number of assignees, some of whom had their places of business in contracting States, while others had their places of business in non-contracting States.

24. After discussion, the Working Group decided that subparagraph (a) should read along the following lines: "the assignor and the assignee have their places of business in a Contracting State". It was generally agreed, however, that the substance of subparagraph (a) might need to be reconsidered in the context of the future discussion on the issue of conflicts of priority and other substantive provisions of the draft Convention.

Subparagraph (b)

25. A concern was expressed that the reference to the rules of private international law might create uncertainty as to the applicability of the draft Convention. It was
stated that the efficacy of the draft Convention in increasing the availability of credit was based on certainty and predictability as to which situations it governed. In response, it was stated that the reference to the rules of private international law provided a useful extension of the scope of application of the draft Convention. It was also stated that the uncertainty that might stem from disparities among applicable private international law rules would not be avoided by limiting the applicability of the draft Convention, since the rules of private international law also applied outside the scope of the draft Convention. After discussion, the Working Group adopted the text of subparagraph (b) unchanged.

**Paragraph (2)**

26. While there was broad support in the Working Group for both the principle and the formulation of paragraph (2), it was agreed that it needed to address the additional question of the time at which a receivable or an assignment had to be international for the Convention to apply.

27. Differing views were expressed as to how the issue of timing should be addressed. One view was that the internationality of both a receivable and an assignment should be determined at the time of assignment. In support of that view, it was observed that such an approach would enhance certainty and predictability as to the application of the draft Convention, since, under most circumstances, the parties would be able to determine the internationality of a receivable or an assignment at the time of the assignment. Another view was that the time at which the test of internationality should be met might differ depending on whether the internationality of a receivable or the internationality of an assignment was involved.

28. It was suggested that, for the draft Convention to apply, a receivable should be international at the time it arose, while an assignment should be international at the time it was made. In favour of determining the internationality of a receivable at the time it arose, it was pointed out that the suggested approach would provide protection for the debtor in the context of an assignment of future receivables. At the time the receivable arose, the debtor would know, through its contractual relationship with the assignor, that its creditor was located in a foreign country and that the assignment fell within the scope of the draft Convention.

29. While support was expressed in favour of the suggested approach, a number of concerns were expressed. One concern was that the suggested approach would create uncertainty since, at the time of the assignment, parties would not be able to determine whether the draft Convention applied to future receivables, as defined in draft article 3(5), i.e. receivables that arose after the assignment. Another concern was that a reference to the place at which a receivable "arose" might prejudice the question whether non-contractual receivables should be covered by the draft Convention and the question of the time at which a receivable "arose", dealt with in draft article 3(4).

30. After discussion, the Working Group decided that paragraph (2) should be redrafted to indicate that the test of internationality should be met, in the case of receivables, at the time they arose and, in the case of assignments, at the time they were made. It was generally agreed, however, that the above-mentioned concerns needed to be taken into account, and that the discussion might need to be reopened in the context of a review of draft article 3.

**Paragraph (3)**

31. The concern was expressed that, while a provision along the lines of paragraph (3) might be appropriate in a relationship involving two parties, it would be inappropriate in a tripartite relationship, in which third parties would have to determine what place had the closest relationship to the relevant contract and to find out what was known to, or contemplated by, the parties to that contract. In addition, it was observed that paragraph (3) might create uncertainty, particularly in an electronic-commerce environment, since there might be situations in which it would be impossible to determine the place of business of the parties with the closest relationship to the relevant contract (e.g. transactions concluded through Internet).

32. With a view to addressing those concerns, the suggestion was made that, instead of referring in paragraphs (1) and (2) to the place of business of the parties, reference should be made to their place of organization, which would always be a single place and one that would be easier to determine than the place of business, since it would be a matter of public record. That suggestion was objected to on a number of grounds. It was observed that the place of business worked well as a criterion for determining the internationality of a transaction and the territorial application of many legal texts and should, for that reason as well as for consistency reasons, be retained. In addition, it was stated that a reference to the place of organization of the parties would require additional provisions dealing with the location of physical persons. Moreover, it was pointed out that the suggested reference to the place of organization of the parties would not solve the problem of multiple locations of the parties, since the term "place of organization" was not understood in the same manner in all legal systems. The example was given of the location of the head-office and of a branch of the same corporation, which in some legal systems could be understood as two different places of organization of the same corporation.

33. In the discussion, the suggestion was made that, in order to determine the place of business of the parties with the closest relationship to the relevant contract, reference should be made to the stipulations of the parties. That suggestion too was objected on the ground that such an approach could inadvertently result in allowing the parties to a contract to specify as the relevant place of business a place which might have no relationship to that contract whatsoever. After deliberation, the Working Group adopted paragraph (3) unchanged.

**Form of instrument being prepared**

34. In the course of the discussion of draft article 1, the view was expressed that the Working Group might wish
to reconsider the working assumption adopted at its previous session as to the form of the instrument being prepared (A/CN.9/432, paras. 26-28). It was suggested that the text should take the form of a model law. It was stated that a model law would present the advantage of allowing enacting States flexibility in adjusting it to their national legislation and would thus be more likely to be accepted by States. That view failed to attract sufficient support. It was generally agreed that a convention would achieve a higher degree of certainty in the law applicable to assignments, which could have a positive impact on the availability and the cost of credit. After discussion, the Working Group confirmed its working assumption that the text being prepared should take the form of a convention.

"Opting-in"/"opting-out"

35. The Working Group considered the question whether a general opting-in clause (i.e. a clause that would result in the application of the draft Convention only if the parties to an assignment chose to subject their relationship to the draft Convention) should be included in the draft Convention.

36. In favour of an opting-in clause, it was stated that it would have the advantage of allowing parties to choose between the techniques provided for the transfer of receivables by the draft Convention and those currently existing under national laws. In addition, it was observed that an opting-in clause could make the draft Convention more acceptable to States. However, the prevailing view was that an opting-in clause would unnecessarily limit the cases in which the draft Convention would apply. It was generally felt that, in any case, the draft Convention was not aimed at replacing national assignment-related rules but rather at facilitating the increased use of assignment techniques in situations where an element of internationality was involved. In such situations, assignments were currently not widely practiced in view of the uncertainty prevailing under national laws with regard to their validity and enforceability.

37. The Working Group next turned to the question whether an opting-out clause (i.e. a clause allowing the parties to exclude the application of the draft Convention) should be included in the draft Convention. It was noted that at its previous session the Working Group had agreed not to include a general opting-out clause, but to consider whether the parties should be allowed to exclude the application of the draft Convention, or to derogate from or vary the effect of its provisions that regulated their mutual rights and obligations, in the context of each article (Article 2).

38. Differing views were expressed. One view was that, while the assignor and the assignee should be able to choose the law applicable to their transaction, such a choice should not affect the rights of the debtor and other third parties. It was observed that such a choice of law could create difficulties, in particular, in the context of subsequent assignments, since it could inadvertently result in some assignments being covered by the draft Convention, while other assignments would fall under the law chosen by the parties. It was stated that such an approach could jeopardize the certainty and predictability with regard to the rights of third parties, and thus have an adverse impact on the availability and cost of credit.

39. The prevailing view, however, was that the draft Convention should recognize party autonomy, which included the right of the parties to choose the law applicable to their mutual rights and obligations, as well as their right to derogate from or vary the effect of individual provisions of the draft Convention. In support of that view, it was observed that party autonomy was an important principle which should not be interfered with and the adoption of which would make the draft Convention more easily acceptable. In addition, it was pointed out that, in any case, the choice of law of the parties to a contract could affect only their mutual rights and obligations and not those of third parties. If the assignor and the assignee chose to exclude the application of the draft Convention, the draft Convention could still apply to the rights of the debtor and other third parties, if it were the law governing the original contract. It was observed that such an approach would be in line with the principle embodied in the draft Convention that the assignment should not change the rights and obligations of the debtor.

40. In the discussion, the question was raised whether the parties to the assignment only, or the parties to the original contract as well, should have the right to exclude the application of the draft Convention to their relationship. It was pointed out that assigns and assignees should have the right to determine the law applicable to their relationship. In addition, it was observed that debtors might have an interest in excluding the application of the draft Convention, in particular in view of the fact that, as a result of an international assignment of domestic receivables, their rights and obligations might be made subject to a legal regime that differed from the rules applicable to domestic assignments.

41. After consideration, the Working Group decided that the draft Convention should be included in the draft Convention and to the original contract to exclude the application of the draft Convention. With regard to the mandatory or non-mandatory character of the provisions of the draft Convention, the Working Group decided that the parties to the assignment should be able to derogate from or vary those provisions of the draft Convention that dealt with their mutual rights and obligations.

Article 2. Exclusions

42. The text of draft article 2 as considered by the Working Group was as follows:

"This Convention does not apply to assignments:

(a) for personal, family or household purposes;
(b) between individuals as gifts;
43. The Working Group noted that the substance and structure of draft article 2 reflected the approach taken by the Working Group at its previous session, under which the scope of the draft Convention should be defined in broad terms, subject to the introduction in the text of a list of assignments, receivables and parties to be excluded from the scope of the draft Convention. Such an approach responded to the decision made by the Working Group that the focus of the draft Convention should be on assignments made in order to secure financing and other related services; but that other types of assignments might be covered as well by the draft Convention, as long as the text did not attempt to cover all assignments, which might be impractical and unnecessary (see ACN.9/432, paras. 59, 63 and 65). It was also noted that the contents of draft article 2 were based on tentative suggestions made at the previous session of the Working Group (see ACN.9/432, paras. 59, 63 and 65).

Subparagraph (a)

44. The Working Group found the substance of subparagraph (a), which was modelled on article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as “the United Nations Sales Convention”), to be generally acceptable. It was widely felt that assignments made for personal, family or household purposes were appropriately excluded from the scope of the draft Convention.

45. As to the question whether assignments of personal and family receivables made for financing purposes should also be excluded from the scope of the draft Convention, differing views were expressed. One view was that an additional provision was necessary to exclude such assignments from the scope of the draft Convention. It was stated that, in certain jurisdictions, the assignment of such receivables would be prohibited by mandatory law, which the draft Convention should not attempt to override.

46. The prevailing view, however, was that the assignment of personal and family receivables for financing purposes should not be prohibited by the draft Convention or excluded from its scope of application. The assignment of such receivables for financing purposes was said to be frequently used in practice and it was widely felt that the draft Convention should recognize and support those significant practices (e.g. securitization of credit-card receivables). After discussion, the Working Group adopted subparagraph (a) unchanged.

Subparagraph (b)

47. While the Working Group agreed that “gifts” should be excluded, a number of concerns were expressed as to the exact formulation of subparagraph (b). One concern was that the notion of “gift” used in subparagraph (b) was unclear and might create uncertainty, since it might be interpreted differently in various jurisdictions. In particular, uncertainty might exist as to whether a “gift” was to be understood as covering only a gratuitous transaction or whether it might also cover other types of transactions. It was generally felt that subparagraph (b) should be redrafted to indicate more clearly that assignments made gratuitously were excluded from the scope of the draft Convention.

48. Another concern was that the reference to “individuals” contained in subparagraph (b) might overly narrow the scope of the provision. It was generally felt that all assignments of the type considered under subparagraph (b) should be excluded from the scope of the draft Convention, irrespective of whether they were made by physical or by legal persons. It was agreed that the reference to individuals should be deleted from subparagraph (b).

49. After discussion, the Working Group adopted the substance of subparagraph (b) and requested the Secretariat to prepare a revised draft to address the above-mentioned concerns.

Subparagraph (c)

50. The Working Group found the substance of subparagraph (c) to be generally acceptable. It was generally felt that certain types of instruments normally transferred by way of a simple endorsement or delivery (e.g. bills of exchange, promissory notes or cheques) should be excluded from the scope of the draft Convention, since the draft Convention should not interfere with the operation of other international conventions that typically covered such instruments.

51. As a matter of drafting, however, concerns were expressed that the notions of “negotiable instrument” and “bearer document” were insufficiently precise and might lend themselves to diverging interpretations. For example, it was stated that uncertainty might exist as to whether a stand-by letter of credit could be regarded as a negotiable instrument. It was suggested that subparagraph (c) should focus on the means of transfer, i.e. the endorsement or delivery, rather than on the form of the instrument, and should thus be redrafted along the following lines: “solely by endorsement or delivery of an instrument”. After discussion, the Working Group adopted subparagraph (c), subject to the suggested drafting change.

Subparagraph (d)

52. Differing views were expressed as to whether the draft Convention should cover assignments made by operation of law. One view was that assignments by operation of law should be excluded from the scope of the draft Convention, since such assignments were not commonly used for financing purposes. However, it was noted that...
such an exclusion already resulted from the definition of "assignment" under draft article 3(1), which referred to a transfer "by agreement". It was thus suggested that subparagraph (d) was unnecessary and should be deleted.

53. A contrary view was that transfers of receivables by operation of law should be covered by the draft Convention alongside assignments made by agreement. The example was given of assignments of tortious claims arising under insurance contracts, a practice that was said to be particularly important. It was also stated that legal mechanisms, such as subrogation, which might derive either from contract or from the operation of law should be covered by the draft Convention. In that connection, however, it was observed that subrogation was expressly covered by the definition of "assignment" under draft article 3(1).

54. The prevailing view was that assignments made by operation of law should be covered by the draft Convention only to the extent that such assignments might be used for financing purposes. It was generally felt that only those assignments that resulted automatically from the operation of law, such as assignments of receivables in the context of an inheritance process, should be excluded from the scope of the draft Convention. As a matter of drafting, it was suggested that subparagraph (d) should read along the following lines: "made automatically by operation of law". After discussion, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (d), taking into account the suggested wording.

Subparagraph (e)

55. The substance of subparagraph (e) was found to be generally acceptable. It was generally felt, however, that the scope of the provision should be broadened to address not only the situation where a business was sold, but also other situations where the ownership of that business might be modified, e.g. in case of a merger. The Working Group decided that the focus of the provision should be not on the nature of the transaction that modified the ownership of the business but on the assignment being treated as an accessory element of that transaction. After discussion, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (e) to reflect the decision.

Subparagraph (f)

56. The Working Group decided to delete subparagraph (f). It was generally felt that assignments of receivables owed by individual merchants and consumers were part of significant practices, such as securitization, that should not be excluded from the scope of the draft Convention.

Subparagraph (g)

57. Differing views were expressed as to whether subparagraph (g) should be retained. In favour of retention of subparagraph (g), it was stated that normally under national law the assignment of wages was prohibited or restricted with a view to protecting employees. The prevailing view, however, was that subparagraph (g) should be deleted. It was generally felt that the right of the employees to obtain credit based on their wages should be preserved, at least in cases in which such assignments of wages were not prohibited under national law. It was also agreed that retention of subparagraph (g) might inadvertently result in excluding from the scope of application of the draft Convention significant practices, e.g. practices involving the financing of temporary employment services. While draft article 10 led by implication to the result that statutory prohibitions of assignments were not covered by the draft Convention, the Working Group decided to delete subparagraph (g) and to address the question of statutory prohibitions of assignment in the context of draft article 10.

Subparagraph (h)

58. The Working Group found the substance of subparagraph (h) to be generally acceptable. It was widely felt that assignments of receivables from contracts under which the assignee was to perform the contract were not financing transactions and should thus be excluded from the scope of application of the draft Convention. As to the exact formulation of paragraph (h), it was suggested that reference should be made to situations in which not only the right to receive payment but also the obligation to perform the contract from which the receivable arose was being transferred. After discussion, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (h) to reflect the above-mentioned suggestion.

Subparagraphs (i) and (j)

59. The Working Group decided to delete subparagraphs (i) and (j). It was generally felt that the assignment of insurance premiums, as well as the assignment of receivables from leases, involved significant financing practices that should be covered by the draft Convention.

Subparagraph (k)

60. Differing views were expressed as to whether subparagraph (k) should be retained. In favour of retention of subparagraph (k), it was stated that the assignment of deposit accounts raised complicated issues that might be difficult to address, including: whether the bank with which a deposit account was held would have a duty to pay the assignee; whether a bank's set-off would have priority over the claim of an assignee; and what would be the effect of an assignment of the credit balance in a deposit account to the bank that held that account.

61. The prevailing view, however, was that subparagraph (k) should be deleted. It was generally felt that the assignment of deposit accounts would, in any case, not be covered by the draft Convention, since normally it would be prohibited under national law. After discussion, the Working Group decided to delete subparagraph (k).

Article 3. Definitions

62. The text of draft article 3 as considered by the Working Group was as follows:

"For the purposes of this Convention:
"(1) 'Assignment' means the transfer by [written] agreement [of one or more, existing or future] receiv-
ables, or of partial and undivided interests in receivables, from one or more parties ("assignor") to another party or parties ("assignee"), by way of sale, by way of security for performance of an obligation, or by any other way [, including subrogation, novation or pledge of receivables].

"[2] 'Receivables financing' means any transaction in which value, credit or related services are provided for value in the form of receivables. 'Receivables financing' includes, but is not limited to, factoring, forfaiting, securitization, project financing and refinancing."

"[3] 'Receivable' means any right of the assignor or another party or parties to receive or to claim payment of a monetary sum from another party or parties.

"[4] 'Original contract' means a contract from which a receivable arises. [A receivable 'arises' when the original contract is concluded] [when it becomes payable] [when it is earned by performance] [when it accrues].

"[5] 'Future receivable' means a receivable that might arise after the conclusion of the assignment.

"[6] 'Writing' means any form of communication that preserves a complete record of the information contained therein and provides authentication of its source by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.

"[7] 'Notification of the assignment' means a statement informing the debtor that an assignment has taken place.

"[8] 'Priority' means the right of a party to receive payment in preference to another party."

**Paragraph (1) ("Assignment")**

63. Broad support was expressed in the Working Group in favour of the substance of paragraph (1). The Working Group went on to consider the wording within square brackets and the exact formulation of paragraph (1).

"[written]"

64. Doubts were expressed as to whether it was appropriate for the written form to be made an element of the definition of "assignment". A suggestion was made that the question of the form of the assignment should be dealt with only in the context of draft article 7. It was recalled that referring to the written form in the definition of "assignment" or only in a substantive provision establishing certain form requirements might entail different legal consequences as to the legal regime of purely oral assignments under the draft Convention.

65. After discussion, the Working Group decided to delete the reference to "written" assignments from paragraph (1), since it appeared unnecessary to place oral assignments outside the scope of application of the draft Convention. It was agreed that such oral assignments should be either recognized or invalidated by the draft Convention, a matter to be discussed in the context of draft article 7.

66. The Working Group agreed that the assignment of single receivables as well as the assignment of a pool of receivables, existing or future, should be covered by the draft Convention. As a matter of drafting, it was suggested that that result could be achieved even if the words "one or more" were to be deleted. Subject to that change, the Working Group decided to retain the reference to "existing or future receivables" without the square brackets.

"[partial or undivided interests in receivables]"

67. The Working Group decided to retain the reference to partial and undivided interests in receivables without the square brackets. It was observed that such receivables were often assigned in the context of significant transactions, such as securitizations, loan participations and loan syndications.

"from one or more parties"

68. It was generally agreed that the draft Convention should cover situations in which financing originated from several sources (e.g. loan syndications and loan participations). As a matter of drafting, it was suggested that the term "party" should suffice, since such a reference would be understood as including several parties. It was observed that that result might be more clearly achieved if the draft Convention were to include a rule of interpretation along the following lines "singular includes plural". The Working Group decided that situations in which one or more parties were involved should be covered and requested the Secretariat to reflect that decision in a revised draft of paragraph (1), taking into account the views expressed.

"by way of sale, by way of security"

69. It was observed that the reference to "sale" might be inappropriate in that it referred not only to the means, but also to the purpose, of the assignment.

"[including subrogation, novation or pledge of receivables]"

70. The view was reiterated that the draft Convention should establish a new type of assignment that would be available to those parties in international trade that would wish to opt for the application of the draft Convention to their relationships. The suggestion was thus made that the reference to other techniques for transferring receivables should be deleted. That view failed to attract sufficient support. It was recalled that the Working Group had decided to cover assignment and related practices, subject to the right of the parties to exclude the application of the draft Convention to their mutual rights and obligations (see paragraph 41, above). The Working Group decided to retain the reference to assignment-related practices without the square brackets.

**Paragraph (2) ("Receivables financing")**

71. The Working Group noted that "receivables financing" was referred to in the title, the preamble and draft article 12(3). It was generally agreed that the definition of
receivables financing was useful in that it clarified the types of practices to be covered by the draft Convention and should be retained. In the discussion, the attention of the Working Group was drawn to the need to ensure in draft article 5 that any potential conflicts between the draft Convention and the UNIDROIT Convention on International Factoring (Ottawa, 1988; hereinafter referred to as “the Factoring Convention”) would be resolved in an appropriate way. After discussion, the Working Group decided to retain the definition of receivables financing unchanged.

Paragraph (3) (“Receivable”)  
72. It was noted that the definition of “receivable” was intended to cover a wide range of receivables, including: contractual (whether earned by performance or not) and non-contractual receivables; damages of any nature; receivables payable in any currency; receivables in a strict sense (“the right to claim”) and proceeds of receivables (“the right to receive”).

73. Differing views were expressed as to whether the assignment of non-contractual receivables should be covered by the draft Convention. One view was that non-contractual receivables should not be covered. In support of that view, a number of arguments were made, including that: tort receivables involved a great deal of uncertainty and that, as a result, their assignment was not a sufficiently significant financing practice; that the assignment of tort receivables raised a number of complicated issues (e.g. the definition of a future tort receivable, time of transfer and applicable law); and that covering tort receivables might make the draft Convention less acceptable to States.

74. The prevailing view, however, was that non-contractual receivables should be covered on the grounds that significant financing practices involved the assignment of tort receivables (e.g. assignment of insurance claims); and that restricting the scope of application to contractual receivables would require that a distinction be drawn between contractual and non-contractual receivables, notions that were not universally understood in the same manner. After discussion, the Working Group decided that the broad scope of the definition of “receivable” should be retained so as to cover both contractual and non-contractual receivables.

75. The Working Group next turned to the question whether the notion of “receivable” should be limited to monetary receivables or expanded so as to cover other, non-monetary receivables (e.g. the right to receive precious metals, securities, goods or commodities).

76. One view was that the definition of “receivable” should be expanded to include precious metals and securities. It was observed that the lending of precious metals or securities (in which the borrower had to repay in kind or the monetary equivalent of the gold or securities borrowed) was a significant practice which the draft Convention should recognize. Another view was that the definition of “receivable” should be expanded even further so as to cover, e.g. rights to receive goods or commodities.

In that regard, a note of caution was struck in that such an approach might be overambitious and make the draft Convention less acceptable to States. In the same vein, it was observed that commodities were traded in organized markets, which were subject to special rules and should not be covered by the draft Convention.

77. After discussion, the Working Group approved the substance of the definition of “receivable” and requested the Secretariat to prepare a revised draft of paragraph (3), presenting variants to reflect the above-mentioned views and suggestions (for further discussion of the matter, see paragraph 137, below).

Paragraph (4) (“Original contract”)  
First sentence  
78. It was observed that, in its present formulation, paragraph (4) did not make it sufficiently clear that the receivable arose out of the original contract as an asset that belonged to the assignor. It was thus suggested that the original contract should be defined by reference to the parties thereto (i.e. the assignor and the debtor). Subject to that change, the Working Group adopted the first sentence of paragraph (4).

Second sentence  
79. Broad support was expressed in the Working Group in favour of a rule of interpretation dealing with the time at which a receivable “arose”. It was generally felt that determining that time was important because it was referred to in the definition of “future receivable” and in several articles dealing with the time at which an assigned receivable was transferred (e.g. draft articles 8, 9, 23 and 24). In that context, it was observed that the time at which a receivable should be deemed as arising might be different, depending on whether a contractual or non-contractual receivable would be involved.

80. The Working Group considered first the question of the time at which a contractual receivable arose. One view was that the receivable should be treated as arising at the time when it became payable. That view was objected to on the ground that delaying the time at which a receivable arose could have adverse effects on the availability of credit. Another view was that a receivable should be considered as arising at the time when the original contract was concluded. It was observed that such an approach would enhance certainty and predictability, since at that time the identity of the creditor and the debtor, the legal source of the receivable and its amount would be known. While that view received broad support, it was pointed out that it might need to be supplemented by a reference to the time at which the original contract became enforceable. After discussion, the Working Group decided that a contractual receivable should be considered as arising at the time when the original contract was concluded.

81. The Working Group next exchanged views on the question of the time at which a non-contractual receivable arose. One view was that a tort receivable arose at the time at which the debtor and the legal source of the receivable could be identified. That view was objected to
on the grounds that it introduced uncertainty as to the
time when a tort receivable arose. It was pointed out that
time was of importance, since, e.g. a tort receivable after
affirmation by a court decision.

Another view was that a tort receivable arose at
the time when it was agreed upon by the parties or con-

firmed by way of a court decision. It was observed that
such an approach would provide more certainty and
would avoid raising problems of applicable law.

82. After deliberation, the Working Group requested the
Secretariat to prepare a draft provision dealing with the
time at which a non-contractual receivable arose, with
possible variants taking into account the various views
expressed in the discussion.

Paragraph (5) (“Future receivable”)

83. The Working Group decided that the definition of
“future receivable” should be considered in the context of the
discussion of draft article 8(2) dealing with the time
of transfer of future receivables (see paragraphs 109-114,
below).

Paragraph (6) (“Writing”)

84. The Working Group adopted paragraph (6) un-
changed.

Paragraphs (7) and (8) (“Notification” and “Priority”)

85. The Working Group decided to defer its discussion of paragraphs (7) and (8) until it had completed its review of draft articles 15 and 22-24 (see paragraphs 167 and 244 respectively).

Article 4. Debtor’s protection

86. The text of draft article 4 as considered by the Working Group was as follows:

“(1) An assignment does not have any effect on the
debtor’s duty to pay except that upon receipt of noti-
fication of the assignment the debtor is entitled to dis-
charge its obligation, subject to article 16, by paying
the assignee.

“(2) An assignment does not prejudice the debtor’s
rights against the assignor arising from the failure of
the assignor to perform the original contract.”

Paragraph (1)

“An assignment does not have any effect on the
debtor’s duty to pay ...”

87. It was recalled that paragraph (1) expressed the fun-
damental principle that an assignment should not change
the debtor’s legal position, a principle embodied also in
draft articles 16 and 17, which attracted broad support at
the previous session of the Working Group (A/CN.9/432,
 paras. 89 and 244). Various views were expressed as to
how that principle should be expressed in the draft Con-
vention. One view was that the fundamental principle
regarding the debtor’s discharge of its obligation to pay
was sufficiently reflected in draft article 16. It was thus
suggested that paragraph (1) should be deleted. The pre-
vailing view, however, was that a general provision ex-
pressly stating the principle that the assignment should
not change the legal position of the debtor was needed in
the earlier part of the draft Convention. Moreover, it was
generally felt that the principle expressed in draft article
1 was broader in scope than draft articles 16 and 17,
which dealt only with certain aspects of the legal position
of the debtor. After discussion, the Working Group reaf-
irmed its decision that a general statement should be
included in draft article 4. It was generally agreed that the
principle should be expressed in broad terms, along the
following lines: “An assignment does not have any effect
on the legal position of the debtor”.

“... except that upon receipt of notification of
the assignment the debtor is entitled to discharge
its obligation, subject to article 16, by paying
the assignee.”

88. As to the structure of paragraph (1), the view was
classified that it was inappropriate to combine in the
same provision a general statement of principle, i.e. that
the assignment should not affect the debtor’s duty to pay,
and an operative rule regarding only the effect of notifi-
cation on the debtor’s discharge of its obligation to pay.

It was stated that such an operative rule would more
appropriately be dealt with in the context of draft article
16, together with other rules regarding the effect of noti-
fication of an assignment on the debtor’s discharge of its
obligation to pay. In addition, it was stated that, as cur-
rently drafted, paragraph (1) might be misinterpreted as
solving all the difficulties that might arise from the inter-
play of the general principle it reflected and the other
provisions of the draft Convention.

89. It was pointed out that the question of the possible
impact of the draft Convention on the debtor’s legal po-

tion might need to be considered not only with respect
to draft article 16, but also with respect to draft articles
10, 17 and 18. It was thus suggested that the words “ex-
cept that upon receipt of notification of the assignment
the debtor is entitled to discharge its obligation, subject
to article 16, by paying the assignee” should be deleted.

As an alternative suggestion, it was stated that, if the
reference to draft article 16 was to be maintained, addi-
tional references to the effect of other provisions of the
draft Convention on the legal position of the debtor might
need to be considered in draft article 4. Yet another sug-
gestion was that the only exception to the general prin-
ciple expressed in paragraph (1) should be the case where
the debtor consented to a change in its legal position as
a result of the assignment.

90. The prevailing view was that, since draft article 16
was the only exception intended to be made by the draft
Convention to the general principle that an assignment
did not affect the debtor’s legal position, draft article 4
should refer only to draft article 16. Possible conflicts
between the principle established in draft article 4 and
other provisions of the draft Convention, e.g. draft arti-
cles 17 and 18, might need to be discussed in the context
of a review of those draft articles. It was agreed that, if
additional conflicts could not be avoided, the discussion of draft article 4 might need to be reopened.

91. As to the substance of the exception contained in paragraph (1), the view was expressed that the words “the debtor is entitled to discharge its obligation by paying the assignee” were inappropriate, since they might be misinterpreted as allowing the debtor, after notification of the assignment, to continue paying the assignor and obtaining discharge of its obligation. It was stated that, subject to the provisions of draft article 16(3), the notification of an assignment should oblige the debtor to make payment to the assignee. As to how that obligation might be expressed, however, it was felt that the rule in paragraph (1) should be so drafted that the notification of an assignment could not be misinterpreted as creating, in itself, an obligation to pay. It was recalled that, as a result of a decision made by the Working Group at its previous session, the focus of draft article 16 had been changed from the debtor’s duty to pay to the debtor’s discharge (A/CN.9/432, para. 181). As a consequence of that decision, the debtor’s obligation to pay should not be regarded as a matter for the draft Convention but for the original contract and the law applicable to that contract. It was thus suggested that the provision might be redrafted in terms of a positive obligation of the debtor to pay the assignee, subject to the original contract and to the law applicable to that contract.

92. While the suggested redrafting was found to be generally acceptable, it was suggested that the exception stated in paragraph (1) should also recognize that, upon notification, the debtor should conform to the payment instructions contained in the notification of the assignment. For example, where the notification specified that payment should be made not to the assignee but to a third party or to the assignor, the debtor should obtain discharge of its obligation by paying to the party designated in the notification. It was recalled that, under draft article 16(3), the debtor, if so instructed in the notification, would have to discharge its obligation by paying the assignor.

93. After discussion, the Working Group decided that paragraph (1) should be redrafted along the following lines: “An assignment does not have any effect on the debtor’s legal position except that upon receipt of notification of the assignment the debtor, subject to the original contract, if any, discharges its obligation by paying the assignee or by paying as instructed in the notification”. As a matter of drafting, it was suggested that the word “discharges” might need to be replaced by the words “can only discharge”, to avoid creating the impression that notification of an assignment, in itself, created a duty to pay.

Paragraph (2)

94. The Working Group generally agreed that paragraph (2) merely constituted an illustration of the principle stated in paragraph (1) and, as such, was superfluous. After discussion, the Working Group decided that paragraph (2) should be deleted.

General remark

95. At the close of the discussion of draft article 4, it was recalled that the decision made by the Working Group to establish the right of the parties to the assignment to vary individual provisions of the draft Convention (see paragraph 41, above) should be limited to their mutual rights and obligations. Thus, the assignor and the assignee should not be allowed to disregard the principle stated in draft article 4, which should be regarded as mandatory.

Article 5. International obligations of the Contracting State

96. The text of draft article 5 as considered by the Working Group was as follows:

“This Convention does not prevail over any international agreement which has been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the assignor and the debtor have their places of business in States parties to such agreement.”

“...and which contains provisions concerning the matters governed by this Convention”

97. It was suggested that the general reference to “any international agreement” might be insufficiently clear as to which agreements would prevail over the draft Convention in a given contracting State. It was stated that it would be of utmost importance for parties to receivables financing transactions to know with certainty which international texts would, in the view of a given contracting State, supersede the draft Convention. It was thus suggested that draft article 5 should contain a provision to the effect that contracting States would have the obligation to state in a declaration which instruments prevailed over the draft Convention. The view was expressed, however, that a system based on declarations made by States in the context of the ratification process might also raise uncertainties as to the effect of such declarations, in particular with respect to international agreements that might be entered into after the declaration was made.

98. It was recalled that draft article 5 had been introduced in the draft Convention with a view to avoiding possible conflicts with other international instruments, such as the Factoring Convention. It was pointed out, however, that, while a provision along the lines of draft article 5 might be appropriate if the draft Convention dealt with issues of private international law, draft article 5 as currently drafted did not address negative conflicts (e.g. where another international instrument contained a provision that would mirror draft article 5), with the consequence that neither that instrument nor the draft Convention would apply. It was thus suggested that wording should be added to the text of draft article 5 to the effect that, where an international agreement contained a clause similar to that currently embodied in draft article 5, the draft Convention would prevail. After discussion, the Working Group requested the Secretariat to prepare a revised draft of article 5, reflecting the above-mentioned suggestions.
The Working Group considered whether draft article 5 should be aligned with draft article 1(1)(a) in terms of which party should have its place of business in a State party to the international agreement that should prevail over the draft Convention. The view was expressed that, since the conflict-of-laws provisions of the draft Convention also covered the relationship between the assignor and the debtor, all three parties, i.e., the assignor, the assignee and the debtor, should have their places of business in a State party to the international agreement that should prevail over the draft Convention. The prevailing view, however, was that the proviso should be deleted. It was generally felt that the issue of which parties had to be in a State party to the international agreement that should prevail over the draft Convention should be left for determination by reference to the law applicable outside the draft Convention.

Article 6. Principles of interpretation

99. The text of draft article 6 as considered by the Working Group was as follows:

“(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

100. The Working Group found the substance of draft article 6 to be generally acceptable.

Chapter II. Form and content of assignment

Article 7. Form of assignment

102. The text of draft article 7 as considered by the Working Group was as follows:

“Variant A

‘An assignment need not be effected in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Variant B

‘An assignment in a form other than in writing is not effective [towards third parties]. (If the assignment is at some point of time effected in or evidenced by writing, it becomes effective as of that time.)’

103. Support was expressed in favour of both variant A and variant B. In favour of variant A, it was stated that an assignee’s right in the assigned receivables should be independent from formalities. It was also stated that adopting no form requirement for the assignment would be consistent with the absence of specific form requirements under most national laws with respect to the original contract between the debtor and the assignor, and to the underlying financing contract between the assignor and the assignee. It was further stated that variant A was the only approach acceptable under the national laws of a number of countries where imposing specific form requirements for assignment transactions would be regarded as contrary to the general principles of contract law.

104. The prevailing view was that variant B was, in substance, preferable to variant A. It was recalled that, in view of the broad definition of “writing” adopted under draft article 3(6) (see paragraph 84, above), Variant B would only invalidate purely oral assignments. Although examples were given of practices where certain cross-border assignments might be concluded by telephone without being subsequently confirmed in writing, it was widely felt that even such informal practices would imply the conclusion of some form of written agreement defining the general conditions under which individual assignment transactions might be effected. To the extent that such practices would be valid under variant B, the form requirement established in draft article 7 would preserve the level of flexibility needed as to the form of the assignment.

105. As to whether purely oral assignments should be invalid towards any party or, alternatively, vis-à-vis third parties only, it was generally felt that draft article 7 should result in a general prohibition of purely oral assignments. It was stated that such a general prohibition would be consistent with mandatory rules of law existing in certain countries. In addition, it was observed that such an approach was particularly needed in view of the decision of the Working Group to extend the scope of the draft Convention to cover international assignments of domestic receivables. Moreover, it was pointed out that distinguishing between parties to the assignment (i.e., the assignor and the assignee) and third parties (e.g., the debtor) in the context of a provision dealing with the form of the assignment was of no practical relevance and might result in an unnecessarily complex situation. After discussion, the Working Group decided that the words “towards third parties” should be deleted.

106. With respect to the second sentence of variant B (“[If the assignment is at some point of time effected in or evidenced by writing, it becomes effective as of that time.”), the view was expressed that such a provision was needed to make it clear that, where a purely oral assignment was rendered effective by being subsequently put in writing, such an assignment would only become effective as of the time it had been put in writing. The prevailing view, however, was that the issues dealt with in the second sentence should be left to the law applicable outside the draft Convention. After discussion, the Working Group decided that the second sentence of variant B should be deleted.

Article 8. Time of transfer of receivables

107. The text of draft article 8 as considered by the Working Group was as follows:
“(1) A receivable arising up to the time of assignment is transferred at the time of assignment.

“(2) Without prejudice to the rights of the assignor’s creditors, a future receivable is transferred directly to the assignee [when it is assigned] [when it becomes payable] [when it is earned by performance], without the need for a new assignment.”

**Paragraph (1)**

108. The Working Group noted that paragraph (1) stated an obvious rule, which had been included in the text for reasons of completeness, and adopted it unchanged.

**Definition of “future receivable”**

109. Prior to discussing paragraph (2), the Working Group considered the definition of “future receivable”, which had been reserved for future deliberation in the context of draft article 3 (see paragraph 83, above).

110. The concern was expressed that, in its present formulation, the definition of “future receivable” was too broad and covered the entire range of future receivables, including conditional and purely hypothetical receivables. In order to address that concern, the suggestion was made that the types of future receivables covered by the draft Convention should be somehow limited.

111. As to the precise way in which that result could be achieved, a number of proposals were made. One proposal was to introduce a time limit or a requirement for the identification of the debtor at the time of assignment. The latter requirement, it was observed, would resolve the problem of uncertainty as to the application of the draft Convention to an assignment of future receivables, since the identity of both the assignor and the debtor would be known at the time of assignment and, as a result, the internationality of a future receivable could be determined at that time under draft article 1(2) (see paragraphs 29-30, above).

112. Another proposal was that the scope of future receivables covered by the draft Convention should be limited to those that, at the time when they arose, could be identified as assigned receivables. As a result, the definition of “future receivable” should be revised to read along the following lines: “Future receivable means a receivable that might arise after the conclusion of the assignment, provided that at the time it arises it can be identified as a receivable to which the assignment relates”. While broad support was expressed in favour of the principle that future receivables should be identified as receivables to which the assignment related, the suggestion was objected to on the grounds that: identification of future receivables should be a condition of the validity of their transfer and not an element in their definition; and that the time at which the future receivables should be identified as receivables to which the assignment related should be the time of the assignment and not the time at which the receivables arose. The identification of the receivables at the time of the assignment, it was observed, might be useful for evidentiary purposes and would be consistent with current practice.

113. In the discussion, the view was expressed that, while article 8 dealt with the question of time of transfer of receivables and the question whether the original “master” assignment was sufficient, there was no provision in the text of the draft Convention dealing with the more fundamental question of the validity of the assignment of future receivables. It was, therefore, suggested that a provision should be included in the text providing for the validity of the assignment of future receivables. In support of that suggestion, it was pointed out that significant financing practices were faced with the uncertainty prevailing in many legal systems with regard to the validity of the assignment of future receivables. The availability of credit on the basis of receivables, it was said, could be increased if the principle of the validity of the assignment of future receivables were to be enshrined in the draft Convention.

114. After discussion, the Working Group decided to retain the definition of “future receivable” unchanged and requested the Secretariat to prepare a provision dealing with the validity of the transfer of future receivables, taking into account the views expressed.

**Paragraph (2)**

“Without prejudice to the rights of the assignor’s creditors”

115. It was noted that the opening words of paragraph (2) had been inserted pursuant to a decision taken by the Working Group at its previous session that, while the transfer should be effective against all parties, the rights of third parties should not be affected (A/CN.9/432, para. 111). The Working Group decided that the opening words of paragraph (2) should be retained.

“directly”

116. It was noted that the term “directly” was intended to address the question whether the future receivables were acquired by the assignee directly, an important question in case the assignor became insolvent after the assignment but before the receivables arose. The view was widely shared that, should the Working Group decide to set the time of transfer of future receivables at the time of their assignment, that question would not arise and the term “directly” would be unnecessary.

[when it is assigned] [when it arises] [when it becomes payable] [when it is earned by performance]

117. It was recalled that, at its current session, the Working Group had decided that contractual receivables should be deemed to arise at the time of the conclusion of the original contract (see paragraph 80, above). In view of that decision, it was noted, the second alternative (“when it arises”) would result in the future receivable being transferred at the time when the original contract would be concluded (which, as a result of the definition of future receivables, would be after the assignment).

118. Differing views were expressed as to the time at which a future contractual receivable that was assigned should be deemed to be transferred. One view was that
future contractual receivables could be transferred only when they came into existence in the sense that they became payable. In support of that view, it was observed that a non-existing asset could not be transferred. Another view was that future contractual receivables should be deemed to be transferred at the time of the original contract. It was pointed out that such an approach would not compromise the rights of the assignee, since in practice credit was extended at the time when an actual transaction from which receivables might flow was concluded.

119. The prevailing view, however, was that future contractual receivables should be deemed to be transferred at the time of the assignment. It was stated that if the assignment did not have an immediate effect, uncertainty would prevail with regard to the relative rights of the assignee and other parties (e.g. other assignees or creditors of the assignor). Thus, the ability of the assignor to raise credit on the basis of its future receivables would be seriously compromised. As to the fact that future receivables were "non-existing" assets, it was pointed out that that characteristic did not reduce their importance as a source of low-cost credit. Reference was made to currently existing financing practices involving domestic assignments or domestic receivables and to the potential that setting the time of transfer of future receivables at the time of assignment would increase the value of future receivables as a source of credit and provide access to new and increased sources of credit in international markets.

120. In the discussion, the view was expressed that the transfer of future tort receivables should be deemed as occurring at a different time, e.g. when a future tort receivable became payable. For lack of sufficient time, the Working Group referred that question to a future session.

121. After discussion, the Working Group decided that paragraph (2) should be redrafted so as to indicate that future contractual receivables were deemed to be transferred at the time when the assignment was effected.

"without the need for a new assignment"

122. In view of the decision of the Working Group on the time of transfer of future contractual receivables, the view was expressed that the reference to a need for a new assignment was redundant and should be deleted. It was pointed out, however, that such a reference was useful in that it addressed the problem whether a new formality had to be met each time a future receivable arose, or whether the original "master" assignment was sufficient. After discussion, the Working Group requested the Secretariat to revise the final words of paragraph (2) in order to reflect the understanding of the Working Group that a future contractual receivable arose at the time of assignment without the need to have a new assignment document covering that receivable.

General Remarks

123. At the close of the discussion, the view was expressed that, for draft article 8 to apply to an assignment relationship, it would be sufficient if the assignor were in a contracting State. A requirement that the assignee or the debtor be in a contracting State would unnecessarily limit the application of that article and could deprive those parties from access to lower-cost credit. In addition, such a requirement would create difficulties to significant financing transactions that involved a multiplicity of assignees or debtors (e.g. syndicated loans and bulk assignments), not all of whom might be in contracting States.

Article 9. Bulk assignments

124. The text of draft article 9 as considered by the Working Group was as follows:

"Without prejudice to the rights of the assignor's creditors, future receivables that are not specified individually are transferred, if they can be identified as receivables to which the assignment relates either at the time agreed upon by the assignor and the assignee or, in the absence of such agreement, when the receivables arise."

125. The Working Group found the substance of draft article 9 to be generally acceptable. It was widely felt that the draft Convention should apply to bulk assignments and to assignments of single receivables and that it should, in all instances, apply equally to existing and to future receivables. In order to expedite the lending process and to reduce the cost of the transaction to the lender which would be passed on to the assignor, it was stated, a legal framework had to be created, which would reduce the documentation needed to support a loan based on a pool of receivables. If the draft Convention did not adopt the language set forth in draft article 9 and if new documents were required to be executed by the assignor each time a new receivable covered by the draft Convention came into existence, costs of administering a lending programme would increase considerably and the time needed to obtain properly executed assignment documents and to review the documents would slow down the lending process to the detriment of the assignor.

126. As to the precise formulation of draft article 9, it was suggested that an additional provision might be included with a view to expressly establishing the validity of bulk assignments, an issue that might not be readily solved under all legal systems. Another suggestion was that the reference to "future" receivables should be deleted in view of the general nature of the principle underlying draft article 9, which should not suggest that future and existing receivables should be treated differently with respect to the validity of bulk assignments. Yet another suggestion was that the words "either at the time agreed upon by the assignor and the assignee or, in the absence of such agreement, when the receivables arise" were unnecessary, in view of the decision made in the context of draft article 8 as to the time of transfer of contractual receivables, which would apply equally to individual assignments and to bulk assignments. A further suggestion was that the words "are transferred" should be replaced by the words "are assigned", for consistency with the formulation used in draft article 8. After discussion, the Working Group adopted the substance of draft article 9 and requested the Secretariat to prepare a revised draft reflecting the above suggestions.
General remark

127. At the close of the discussion of draft article 9, the view was expressed that, for draft article 9 to apply, only the assignor needed to be in a contracting State. Requiring that all assignees or debtors involved in such assignments be in contracting States would severely limit the scope of application of the draft Convention.

Article 10. Agreements prohibiting assignment

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

“(1) A receivable is transferred to the assignee notwithstanding any agreement between the assignor and the debtor prohibiting assignment.

“(2) Nothing in this article affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of an agreement prohibiting assignment, but the assignee is not liable to the debtor for such a breach.”

Paragraph (1)

129. It was recalled that draft article 10 was intended to cover contractual but not statutory prohibitions of assignment. Draft article 10 was aimed at providing certainty as to the validity of an assignment made in breach of a no-assignment clause, while ensuring that the debtor might recover from the assignor any damage suffered as a result of the assignment. However, that remedy would not be available against the assignee, since otherwise the assignment could be deprived of any value. The Working Group felt that the validity of assignments made in violation of no-assignment clauses was generally acceptable, despite the fact that, under some national laws, such assignments were considered as being invalid, while, under other national laws, no-assignment clauses were held to be invalid. It was stated that such an approach would facilitate receivables financing since no-assignment clauses created uncertainty as to the validity of the assignment, thus increasing the cost of credit.

130. The view was expressed that the reference to no-assignment clauses in paragraph (1) might need to be broadened to cover not only cases where a contractual clause prohibited the assignment of a receivable, but also cases where such a clause limited in any way the assignability of that receivable. It was thus suggested that the words “prohibiting assignment” should be replaced by the words “limiting the assignment in any way”. Subject to that change, the Working Group adopted paragraph (1).

Paragraph (2)

131. As to the liability of the assignee towards the debtor for violation of an anti-assignment clause agreed upon between the assignor and the debtor, which was excluded by the words “but the assignee is not liable to the debtor for such a breach”, differing views were expressed. One view was that releasing the assignee from liability towards the debtor might result in the debtor having to pay the assignee, while being unable to recover from the assignor damages suffered by the debtor as a result of the assignment. Such a situation might arise, for example, if the assignor had, in the meantime, become insolvent. In addition, it was pointed out that such an approach would be inconsistent with the approach taken in a number of national legal systems, particularly in situations where the assignee had acted with negligence or in bad faith.

132. The prevailing view, however, was that extending the liability of the assignor for violating an anti-assignment clause to the assignee would result in reduced availability of lower-cost credit, since assignees would have to examine a large number of contracts in order to ascertain whether they included anti-assignment clauses or not. In addition, it was stated that paragraph (2), to the extent it did not deprive the debtor of its remedies against the assignor, did not change the legal position of the debtor, and was thus consistent with the principle of debtor protection embodied in draft article 4, as well as in other provisions of the draft Convention (e.g. draft article 16).

133. A proposal was made that additional wording should be included in draft article 10 to the effect that no-assignment clauses would be invalid under the draft Convention, or, at least, that the debtor would not be allowed to invoke the breach of a no-assignment clause as a legal ground for terminating the original contract. It was stated that validating no-assignment clauses would result in increasing the cost of credit, particularly in the context of bulk assignments, since assignees might need to review large numbers of contracts to ensure that they did not contain no-assignment clauses. Although some support was expressed in favour of that proposal, the prevailing view was that the draft Convention should not interfere with the relationship between the debtor and the assignor and with the law applicable outside the draft Convention regarding the validity of no-assignment clauses. In addition, it was widely felt that the proposed wording would reduce the acceptability of the draft Convention and raise difficulties, e.g. as to whether the breach of a no-assignment clause should be regarded as a fundamental breach of contract. After discussion, the Working Group adopted paragraph (2) unchanged.

General Remarks

134. At the close of the discussion of draft article 10, it was recalled that the decision made by the Working Group to establish the right of the parties to the assignment to vary individual provisions of the draft Convention (see paragraph 41, above) should be limited to their mutual rights and obligations. Thus, the assignor and the assignee should not be allowed to disregard the principle stated in draft article 10, which should be regarded as mandatory. The view was also expressed that, for draft article 10 to apply, the debtor needed to be in a contracting State.

Non-contractual prohibitions of assignment

135. A question was raised as to whether provisions similar to those contained in draft article 10 should be included in the draft Convention to deal with non-contractual prohibitions of assignment. The view was
expressed that the draft Convention should also validate assignments made in violation of non-contractual prohibitions of assignment, e.g. in situations where the assignment was prohibited by law. It was stated that, where a contracting State chose to ratify the draft Convention, that State should be presumed to adhere to the basic aims of the draft Convention with respect to increasing the availability of lower-cost credit.

136. The prevailing view, however, was that it would be inappropriate for the draft Convention to attempt overruling existing rules of national law, which were often regarded as mandatory, particularly with respect to the non-assignability of certain types of non-contractual receivables. It was generally felt that such an attempt might adversely affect the acceptability of the draft Convention. After discussion, the Working Group decided that non-contractual prohibitions of assignment should not be addressed in the draft Convention.

Assignment of non-monetary receivables

137. In the context of the discussion of anti-assignment clauses, the Working Group reverted to the question discussed in the context of draft article 3(3) whether the draft Convention should cover only monetary receivables or also non-monetary receivables (see paragraphs 75-77, above). The view was expressed that establishing the validity of assignments made in breach of a non-assignment clause might raise particular difficulties with respect to certain types of non-monetary receivables. For example, where the original contract involved the licensing of intellectual property, that contract would normally contain a set of clauses designed to protect the confidentiality of the intellectual property and the protection of the trade secrets that might be involved. It was generally agreed that such contractual frameworks, aimed at prohibiting the assignment of intellectual property, should not be upset by the draft Convention. After discussion, the Working Group decided that the assignment of such non-monetary receivables should be excluded from the scope of application of the draft Convention (see paragraph 77, above).

Article 11. Transfer of security rights

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

"(1) Unless otherwise provided by law or by agreement between the assignor and the assignee, any [personal or property] rights securing the assigned receivables are transferred to the assignee without a new act of transfer.

"(2) Paragraph (1) of this article does not affect any requirement relating to registration of any security rights."

139. It was noted that draft article 11 reflected the principle of automatic transfer of security rights, subject to a contrary statutory or contractual provision, which had been broadly supported at previous sessions of the Working Group (A/CN.9/420, para. 74 and A/CN.9/432, para. 130).

Paragraph (1)

140. The Working Group agreed that paragraph (1) should cover both personal (e.g. guarantees) and proprietary security rights (e.g. pledges, mortgages) and that any statutory prohibition of the transfer of those rights should be generally upheld. As to contractual prohibitions of the transfer of security rights, it was generally felt that they should be upheld, if agreed upon between the assignor and the assignee. It was observed that the approach taken in paragraph (1) allowing the assignor and the assignee to agree that those security rights would not be transferred with the assigned receivables was appropriate, since the assignee might not wish to accept the duties that might relate to those security rights (e.g. maintenance, taxation and insurance of mortgaged real estate).

141. With regard to contractual prohibitions of the transfer of security rights, agreed upon between the assignor and the debtor, differing views were expressed. One view was that such contractual prohibitions should be upheld in order to preserve party autonomy. The prevailing view, however, was that such contractual prohibitions should be treated in the same way as contractual prohibitions of assignment of receivables. The example was given of securitization in which the receivables were assigned from the original creditor to a special purpose corporation, whose only assets were the assigned receivables. In such cases, it was pointed out, the value was not in the receivable but rather in the guarantee given by the owner of the special purpose corporation. It was observed that, if the debtor were to be allowed to exclude the transferability of that guarantee, it would in effect defeat the value of receivables as a basis for financing, a result that would run counter to the policy underlying draft article 10.

142. While treating contractual prohibitions of transfers of security rights along the lines of draft article 10 was found to be acceptable in principle, a number of concerns were raised as to the impact of such an approach on certain third parties.

143. One concern was that such an approach would inadvertently result in imposing on a guarantor an obligation to pay the assignee, instead of the assignor towards whom the guarantor had undertaken an obligation to pay in the first place. It was stated that such an approach would restrict the autonomy of the parties to the guarantee relationship and thus interfere with established practices. However, it was suggested that a distinction should be drawn between accessory and independent guarantees. While guarantees stipulated as accessory would normally be transferred automatically with the principal obligation (i.e. the assigned receivable), independent guarantees (or stand-by letters of credit) would be stipulated as not related to the receivable or the assignment-relationship and should not be transferred automatically to the assignee.

144. It was generally felt that the independence of the undertaking of the guarantor/issuer, as described in the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, should not be compromised. In addition, it was agreed that that result could be
achieved, without restricting the transferability of guarantees as between the assignor and the assignee. In practical terms, it was pointed out, the guarantor/issuer should be able to pay the assignor, while the assignor would have a right to claim the proceeds of that payment. It was pointed out that the Working Group might need to consider the consequences resulting from such a rule in the context of insolvency of the assignor.

145. Another concern was that allowing the automatic transfer of proprietary rights securing the assigned receivables might be inappropriate in case those rights entailed possession of the asset encumbered (e.g. pledge). The example was given of an international assignment of domestic receivables, in which the assets encumbered could be transferred to a foreign country, a result that was said to be particularly undesirable.

146. After discussion, the Working Group decided that agreements between the assignor and the debtor restricting the transferability of rights, personal or proprietary, securing the assigned receivables should be treated along the lines of draft article 10. In addition, the Working Group decided that the transferability of those security rights as between the assignor and the assignee should not prejudice the rights of the guarantor/issuer of an independent undertaking or the owner of an asset which was subject to a possessory security right. On that understanding, the Working Group adopted the substance of paragraph (1) and requested the Secretariat to introduce wording at the appropriate place in the text of the draft Convention, reflecting that understanding.

Paragraph (2)

147. While paragraph (2) was found to be generally acceptable, the suggestion was made that its scope should be expanded so as to cover, in addition to registration, form requirements. It was observed that the question whether the form required for the transfer of a security right should have an impact on the form of the assignment itself might also need to be addressed, either in the context of paragraph (2) or of draft article 7. After discussion, the Working Group adopted the substance of paragraph (2) and requested the Secretariat to prepare a revised draft, taking into account the suggestions made.

Chapter III. Rights, obligations and defences

Article 12. Rights and obligations of the assignor and the assignee

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

"(1) [Subject to the provisions of this Convention], the rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules, general conditions or usages referred to therein.

"(2) The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices which they have established between themselves.

"(3) The assignor and the assignee are considered, unless otherwise agreed, to have impliedly made applicable to the assignment 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 receivables financing practice."

Paragraph (1)

149. It was noted that under paragraph (1), in case of conflict between the draft Convention and the agreement between the assignor and the assignee, the draft Convention would prevail. It was also noted that such an approach would not restrict the autonomy of the assignor and the assignee, since, with the exception of the provisions dealing with the form of the assignment, the provisions of the draft Convention dealing with the rights of the assignor and the assignee (draft articles 11, 12(2) and (3), 13 and 14(1)) could be varied by agreement. The view was expressed that the reference to usages in paragraph (1) was unnecessary and should be deleted, since usages were covered in paragraphs (2) and (3). Subject to that change, the Working Group adopted paragraph (1).

Paragraph (2)

150. It was noted that, under paragraph (2), which was modelled on article 9(1) of the United Nations Sales Convention, general trade usages were subject to the agreement of the parties, while practices established by the parties between themselves were binding unless modified. The view was expressed that the modification introduced in paragraph (2) to the rule in article 9 of the United Nations Sales Convention (i.e. "unless otherwise agreed") was justified. It was explained that, as opposed to the hierarchy of legal rules established in the United Nations Sales Convention where the agreement prevailed over the Convention (article 6), the draft Convention prevailed over the agreement (draft article 12(1)). On the other hand, the view was expressed that the modification was unnecessary, since draft article 12(1) was not mandatory. While agreeing that that question might need to be reconsidered at a future session, the Working Group adopted paragraph (2) unchanged.

Paragraph (3)

151. Paragraph (3), which was modelled on article 9(2) of the United Nations Sales Convention, was found to be generally acceptable in principle. However, a number of concerns were expressed as to its exact formulation. One concern was that the reference to "receivables financing practice" in general could inadvertently result in the application of, for instance, factoring usages to a securitization transaction. In order to avoid that result, the suggestion was made that reference should be made to the "relevant" receivables financing practice. Another concern was that, in its current formulation, paragraph (3) might have the unintended effect of subjecting the domestic assignment of international receivables to international usages. The view was expressed that that concern might be addressed by the requirement contained in para-
graph (3) that only international usages that the parties knew or ought to have known would be applicable. The prevailing view, however, was that even if international usages were known to the parties to a domestic assignment, they should not apply to that assignment. The suggestion was thus made that the scope of paragraph (3) should be limited to international assignments. After discussion, the Working Group adopted the substance of paragraph (3) and requested the Secretariat to prepare a revised draft reflecting the suggestions made.

Article 13. Representations of the assignor

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

“(1) Unless otherwise agreed between the assignor and the assignee, the assignor represents that the assignor is, at the time of assignment, or will later be, the creditor, and that the debtor does not have, at the time of assignment, defences or set-offs that could [deprive the assigned receivables of value] [defeat, in whole or in part, the right of the assignee to request payment].

“(2) Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor will pay.”

Paragraph (1)

153. There was broad agreement in the Working Group as to the general policy underlying draft article 13 that, at the time when the assignee decided to buy a receivable or to grant credit based on that receivable, it was of importance for the assignee to be provided with adequate means to assess the value of that receivable. The view was expressed that that policy might need to be expressed more clearly in paragraph (1) by listing the various elements that would allow the assignee to price a given receivable. For that purpose, it was suggested that the assignee needed representations by the assignor that, at the time of the assignment: the assignor owned the receivable; the assignor had a right to transfer the receivable; the assignor had not previously assigned the receivable to another assignee; and the debtor had no defences to payment and no right of set-off other than those specified in the assignment. In favour of listing the suggested representations in the text of paragraph (1), it was stated that, unless such representations were expressly covered, the assignee might bear the cost of making determinations with respect to some or all of the above-listed elements, which would increase the overall cost of credit. Doubts were expressed, however, as to the suggested method of listing various elements in an exhaustive list. It was suggested that the matter might more appropriately be dealt with by way of a more general, open-ended wording (e.g. a general reference to the “existence” of the receivable), which would also encompass the various items on the suggested list.

154. After discussion, the Working Group, while noting that some of the above-listed elements were already covered in draft article 13, agreed that paragraph (1) should contain a list along the suggested lines. A proposal was made that the representation as to the absence of a previous assignment should be complemented by a representation as to the absence of future assignments. While support was expressed in favour of the proposal, it was pointed out that such an additional representation was not usually encountered in practice, except in the context of “subordination agreements”, i.e. agreements concluded between several assignees to settle conflicts of priorities. It was also stated that the draft Convention might need to accommodate exceptional situations where dual assignments were conceivable. The Working Group agreed that the issue might need to be further discussed at a future session and decided that the proposed wording should be mentioned between square brackets in a revised draft to be prepared by the Secretariat.

155. The Working Group next discussed the nature of the representations of the assignor. In particular, a question was raised as to the sanctions that might be applicable in case of a breach of the assignor’s representations. It was generally felt that the consequences of such a breach of representation had to be considered in the context of the underlying financing contract between the assignor and the assignee, which should not be touched upon by the draft Convention. Moreover, it was felt that it might be difficult to reach a common understanding as to the extent of liability or the measure of damages in the context of such a breach of representation. After discussion, the Working Group decided that draft article 13 should contain no general provision dealing with the issues of breach of representation.

156. As to whether the defences or rights of set-off covered in paragraph (1) should be qualified as “defences that could deprive the assigned receivables of value” or “defences that could defeat, in whole or in part, the right of the assignee to request payment”, various views were expressed. One view was that the mere reference to “defences” might be too broad and result in uncertainties as to the scope of draft article 13. For example, it was stated that it might be unclear whether a delayed payment might be regarded as a “defence” under draft article 13. With a view to clarifying that the reference to “defences” in draft article 13 was not intended to cover the situation where payment was merely delayed, it was suggested that the wording “defences that could defeat, in whole or in part, the right of the assignee to request payment” should be adopted. That suggestion was objected to on the grounds that, for the purpose of pricing receivables, the time of payment might be as critical as the ability to obtain payment.

157. Another view was that the reference to “defences” might need to be qualified to make it clear that, under draft article 13, the assignor should not be understood as representing that the original contract did not contain anti-assignment clauses. In support, it was stated that, in practice, the assignee would or should often know of the existence of anti-assignment clauses in the original contract. In such cases, draft article 13 might lead to the unintended result that the assignee might, for example, be entitled to claim damages from the assignor or to terminate the financing contract, based on breach of the assignor’s representation as to the absence of an anti-assignment clause, which, in fact, was or should have been known to the assignee. In that context, it was pro-
posed that paragraph (1) should only deal with defences or rights of set-off "unknown to the assignee".

158. The Working Group generally agreed that paragraph (1) was not intended to create a specific duty for the assignor to represent that the original contract did not contain an anti-assignment clause. In substance, the issue of anti-assignment clauses was dealt with in draft articles 10(2) in the context of the contractual relationship between the debtor and the assignor, and in draft article 17(3) in the context of the relationship between the assignee and the debtor. Both articles established that the liability for breach of an anti-assignment clause rested with the assignor. However, where the original contract contained an anti-assignment clause, a breach of that clause would not defeat the assignee's right to obtain payment, since payment to the assignee would be due by the debtor under draft article 17(3), in spite of the anti-assignment clause. While the Working Group generally felt that the unintended interpretation of paragraph (1) with respect to anti-assignment clauses was implicitly excluded by the provisions of draft articles 10(2) and 17(3), it was agreed that more explicit wording might need to be introduced in paragraph (1).

159. As to the qualification of defences or rights of set-off under paragraph (1), support was expressed in favour of retaining the words "defeat, in whole or in part, the.." in the context of the assignee's request payment. The prevailing view, however, was that the representations of the assignor should be understood in the broadest possible meaning. With respect to the proposal that paragraph (1) should refer only to defences or set-offs "unknown to the assignee", it was widely felt that, for practical reasons, the application of draft article 13 should not be based on a determination of the actual or constructive knowledge of the assignee, which might give rise to uncertainties. After discussion, the Working Group decided that the reference to "defences or set-offs" should not be qualified.

160. A question was raised as to the application of paragraph (1) to future receivables. The view was expressed that, where future receivables were involved, the provision might be overly burdensome for the assignor if the assignor had to represent that no defences or rights of set-off could be raised in the future against claims that did not exist at the time of the assignment. It was widely felt, however, that, as a default rule, the allocation of risks for unknown defences of the debtor under paragraph (1) was reasonable, since it was within the control of the assignor to perform the original contract well and to avoid giving rise to defences of the debtor, and since, in any case, the assignor was in a better position to know whether the debtor had any defences. In that context, it was recalled that, at its previous session of the Working Group, it had been stated that the approach taken in paragraph (1) was particularly useful, for example, in the context of contracts for the sale of goods in which service and maintenance elements were to be included. It was pointed out that, if the seller-assignor left the goods to deteriorate, that conduct would give rise to defences on the part of the debtor, and the assignee would not be able to do anything to prevent that result (A/CN.9/432, para. 150).

**Paragraph (2)**

161. The Working Group found the substance of paragraph (2) to be generally acceptable. As a matter of drafting, the view was expressed that the words "the debtor will pay" might be misread as focusing on the validity of the instrument under which the assigned receivables arose. It was suggested that paragraph (2) should indicate more clearly that its focus was on the solvency of the debtor, which was the main element in assessing the credit risk linked to the assignment. It was thus proposed that the words "the debtor will pay" should be replaced by the words "the debtor has the financial ability to pay". After discussion, the Working Group adopted paragraph (2) with the proposed wording.

**Article 14 Assignee's right to notify the debtor and to request payment**

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

"(1) Unless otherwise agreed between the assignor and the assignee, the assignee is entitled to give to the debtor notification of the assignment and to request payment of the receivables assigned.

“(2) If the assignee gives notification of the assignment to the debtor in violation of an agreement between the assignor and the assignee prohibiting or restricting notification, the notification is effective but the assignee may be liable to the assignor for breach of contract.”

**Paragraph (1)**

163. The Working Group found the substance of paragraph (1) to be generally acceptable. A question was raised as to whether the assignee should simply be "entitled" to notify the debtor of the assignment and to request payment or whether the provision contained in paragraph (1) should be expressed in the form of an obligation to notify. It was stated that establishing an obligation to notify the debtor of the assignment might help to clarify the rights and obligations of the debtor. It was widely felt, however, that, while the rights and obligations of the debtor might need to be specified (e.g. in draft articles 4 and 16) in situations where the assignor or the assignee had chosen to notify the debtor of the assignment, the draft Convention should not create an obligation, or even be read as encouraging the assignee, to notify the debtor of the assignment. It was widely felt that the draft Convention should not interfere with the legitimate interest which the assignor might have in not disclosing the assignment, except to the extent necessary to preserve the right of the assignee to obtain payment from the debtor. It was recalled that, in many practical situations, either the debtor would not be notified of the assignment, and the assignor would receive payment on behalf of the assignee, or notification of the assignment would be impossible, e.g. in cases of bulk assignments of future receivables.

164. A number of suggestions of a drafting nature were made, including: that the general rule contained in draft article 15 (1)(a) might need to be expressed before draft
article 14 or to be inserted in paragraph (1); and that the words "at the time they become payable" might need to be added at the end of paragraph (1). After discussion, the Working Group adopted the substance of paragraph (1). The Secretariat was requested to consider, in the preparation of a revised text of the draft Convention, the possible combination of the provisions of article 15(1) and paragraph (1).

Paragraph (2)

165. The Working Group found paragraph (2) to be generally acceptable. As to its exact formulation, it was pointed out that, while both the title of draft article 14 and the text of paragraph (1) referred at the same time to the right to notify the debtor of the assignment and to the right to request payment, paragraph (2) only referred to the right to notify. It was generally agreed that paragraph (2) should not be misinterpreted as limiting the right of the assignee to request payment from the debtor in cases where notification of the assignment had been made in violation of a contractual agreement between the assignor and the assignee. Subject to that change, the Working Group adopted paragraph (2).

Article 15. Notification of the debtor

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

"(1) Notification of the assignment shall:

"(a) be given in writing to the debtor by the assignor or by the assignee; and

"(b) reasonably identify the receivables assigned and the person to whom or for whose account the debtor is required to make payment.

"(2) Notification of the assignment may relate to receivables arising after notification."

Definition of "notification"

167. Prior to discussing the text of draft article 15, the Working Group considered the definition of "notification of an assignment" (draft article 3(7)), which had been reserved for future deliberation (see paragraph 83, above). The Working Group agreed that draft article 3(7), under which notification of the assignment meant "a statement informing the debtor that an assignment has taken place", was an essential element of the legal regime of notifications under the draft Convention. As a matter of drafting, the view was expressed that the provisions of draft articles 3(7) and 15 might need to be combined in a single provision. The prevailing view, however, was that the legal regime of notifications was appropriately split between the short definition contained in draft article 3(7) and the more detailed rules stated in draft article 15. After discussion, the Working Group adopted draft article 3(7) unchanged.

Paragraph (1)

Opening words and subparagraph (a)

168. The Working Group found the substance of the opening words and subparagraph (a) to be generally acceptable.

Subparagraph (b)

169. While the substance of subparagraph (b) was found to be generally acceptable, a number of suggestions were made as to its exact formulation. One suggestion was that wording should be added to the text of subparagraph (b) to the effect that the assignor or the assignee, when notifying the debtor of the assignment, should be under a general obligation to furnish the debtor with adequate proof that the assignment had been made. It was stated that, while draft article 16(7) merely placed the assignee under such an obligation "if requested by the debtor", the production of adequate proof that the assignment had taken place should be made a general condition of effectiveness of the notification. The suggested wording, it was said, would enhance certainty in the assignment process. The widely prevailing view, however, was that establishing such a general condition of effectiveness would make the assignment process excessively cumbersome.

170. Another suggestion was that the reference to "the person to whom" the debtor was required to make payment might need to be complemented by a reference to "the address" at which the debtor might be required to make payment under the notification. It was generally felt that such an amendment was needed in view of the increased frequency of instructions to pay, for example into bank accounts or post office boxes rather than to an identified person.

171. As to the change in the payment instructions by way of the notification of the assignment, several concerns were expressed. One concern was that the text of subparagraph (b) might need to be redrafted to make it clear that, while recognizing the effectiveness of the payment instructions contained in the notification, the draft provision should not interfere with certain legal characteristics of the payment obligation that might stem from the original contract and vary the rules applicable to that contract outside the draft Convention, as to whether payment was due at the address of the payee or whether it should be collected by the payee. Another concern was that recognizing the effectiveness of the payment instruction contained in the notification should not result in adversely affecting the situation of the debtor. With a view to limiting the possibly adverse effects that a change in the payment instructions might entail for the debtor, it was suggested that wording should be inserted in the text of subparagraph (b) to the effect that the person to whom, or the address at which, the debtor could be required to pay under the notification should be located in the same country as the debtor or the assignor. After discussion, the Working Group approved the substance of subparagraph (b) and requested the Secretariat to introduce wording in the text of subparagraph (b) or in draft article 4 to address the concerns expressed.

Paragraph (2)

172. Broad support was expressed in favour of the policy reflected in paragraph (2) that notification could relate to future receivables. As to the question whether the validity of the notification of an assignment of future
receivables should be limited in time, differing views were expressed.

173. One view was that no time limit was acceptable for the validity of the notification under the draft Convention. It was stated that possible restrictions as to the validity of a notification should be dealt with in the context of the underlying financing contract between the assignor and the assignee, and should not be touched upon by the draft Convention. It was stated that, in cases of long-term contracts, the renewal of a notification at the expiry of a fixed period of time might be overly burdensome, in particular where bulk assignments were involved. It was also stated that an obligation to renew the notification might be disruptive of commercial practices based on long-term relationships in that it would introduce an element of uncertainty as to whether the notification had been renewed, properly or at all. It was pointed out that any limitation to either the validity of assignments of future receivables or the validity of the notification of assignments of such receivables would adversely affect the economic autonomy of potential assignors.

174. In favour of limiting in time the validity of notifications of assignments, it was stated that such a limitation would be consistent with the law applicable in a number of countries. The view was widely shared that some form of limitation of the validity of a notification of assignment of future receivables might be acceptable. However, a note of caution was struck as to the risk that limiting the validity of notifications to a short period of time might result in an excessive disruption of existing market practices with respect to future receivables. In the same vein, it was stated that possible limitations on the validity of notifications should not be inconsistent with the definition of “future receivables” under the draft Convention. In particular, if “future receivables” as defined under the draft Convention were not limited in time, it might be inappropriate to defeat the effect of such a definition by restricting the validity of the notification. It was suggested that limiting the effectiveness of notifications to a period of five years might be sufficiently protective of market practices, provided that such a period was renewable.

175. It was thus suggested that paragraph (2) might be redrafted to include additional language specifying that the validity of a notification of assignment of future receivables would be limited to a period of five years, subject to a renewal of the notification within the five-year period. Such additional language might be placed between square brackets for consideration by the Working Group at a future session. While strong support was expressed in favour of that suggestion, the Working Group felt that that matter needed to be further considered at a future session.

Article 16. Debtor's discharge

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

"(1) Until the debtor receives notification of the assignment pursuant to article 15, it is entitled to discharge its obligation by paying the assignor.

"(2) After the debtor receives notification of the assignment pursuant to article 15, subject to paragraph (3), it is entitled to discharge its obligation by paying the assignee.

"(3) Notwithstanding notification of the assignment pursuant to article 15, the debtor shall discharge its obligation by paying the assignee, if:

"[(a) the debtor has actual knowledge of the invalidity of the assignment; and

"(b) the debtor is instructed in the notification to continue paying the assignor.

"(4) Notwithstanding notification of the assignment pursuant to article 15, if the debtor receives notification of a prior assignment pursuant to article 15, or of measures aimed at attaching the assigned receivables, including but not limited to judgements or orders issued by judicial or non-judicial bodies, as well as of measures effecting by operation of law, in particular in case of insolvency of the assignor, it is entitled to [discharge its obligation by depositing the amount owed with a public deposit fund] [seek instructions from a competent judicial or non-judicial body and pay as instructed].

"(5) In case the debtor receives notification pursuant to article 15 of more than one assignment of the same receivables made by the same assignor, the debtor is entitled to discharge its obligation by paying the first assignee to give notification of the assignment pursuant to article 15 and has against that assignee the defences and set-offs provided for under article 17.

"(6) If so agreed between the assignor and the debtor before notification of the assignment pursuant to article 15, the debtor is entitled to discharge its obligation by paying into a bank account or a post office box specified in the agreement. After notification of the assignment pursuant to article 15, the debtor and the assignee may agree on the method of payment.

"(7) 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 is entitled to pay the assignor and be discharged from liability [deposit the amount owed with a public deposit fund] [seek instructions from the competent judicial or non-judicial body and pay as instructed]. Adequate proof includes, but is not limited to, any document emanating from the assignor and indicating that the assignment has taken place.

"(8) Paragraph (2) of this article does not prejudice any other ground on which payment by the debtor to the assignee discharges the debtor's obligation.

Paragraph (1)

177. The Working Group agreed with the rule established in paragraph (1), namely that, up to the notification of the assignment, the debtor had a right to discharge its obligation by paying the assignee, and adopted paragraph (1) unchanged.
Paragraph (2)

178. It was noted that paragraph (2) was cast as entitling, and not obliging, the debtor to pay the assignee after notification, since the obligation to pay was stemming from the original contract and not from the notification itself.

179. While the Working Group agreed with the general policy underlying paragraph (2), it was generally felt that, in its current formulation, paragraph (2) might lead to the unintended result that the debtor, after notification, would have the discretion to discharge its obligation by paying the assignor or the assignee, a result that might create uncertainty as to the rights of the assignee. The suggestion was thus made that paragraph (2) needed to be reformulated to provide that, after notification, the debtor was obliged, subject to the original contract, if any, to discharge its obligation by paying the assignee. In addition, in order to align paragraph (2) with current practices, it was suggested that reference should be made, in addition to payment to the assignee, to payment being made pursuant to the instructions contained in the notification, an idea that was already reflected in subparagraph (b) of paragraph (3). Subject to the changes suggested, the Working Group adopted paragraph (2).

Paragraph (3)

Subparagraph (a)

180. The Working Group decided to delete subparagraph (a). It was generally felt that introducing a subjective criterion, i.e. knowledge of the assignment by the debtor, in the substance of a rule dealing with the debtor’s discharge of its obligations would undermine the twin goals of such a rule, namely debtor protection and legal certainty in the context of the assignment. In addition, the view was widely shared that subjecting the debtor’s discharge to its knowledge of the validity of the assignment would place on the debtor the burden of having to establish the validity of the assignment, not only as a matter of fact but also as a matter of law, a burden that was said to be too onerous for the debtor to bear. Moreover, it was observed that a rule along the lines of subparagraph (a) could lead to unintended results. For example, if the debtor were diligent and discovered the invalidity of the assignment, the assignment would be defeated; and, if the debtor did not sufficiently try to establish the invalidity of the assignment, it might be required to pay twice.

Subparagraph (b)

181. The Working Group decided that the principle stated in subparagraph (b) should be incorporated into paragraph (2). As a result of that decision and the decision to delete subparagraph (a), the Working Group decided that paragraph (3) as a whole should be deleted.

Paragraph (4)

182. The Working Group decided to delete paragraph (4). It was stated that paragraph (4) was either superfluous, in that it repeated a rule already existing under national law governing attachment or insolvency issues, or unacceptable, in that it might run counter to fundamental considerations of national law. In addition, it was observed that paragraph (4) might raise uncertainty since it introduced too many different ways in which the debtor could discharge its obligation. Moreover, it was pointed out that paragraph (8) could be usefully expanded so as to cover all those situations in which the debtor could be discharged by paying the right person, or by paying into court or as instructed by a court. The suggestion was thus made that paragraph (8) should be reformulated along the following lines “This article does not prejudice any other ground on which payment by the debtor discharges the debtor’s obligation”. While that suggestion was broadly supported, it was stated that paragraph (8) did not cover other situations, e.g. knowledge of which was the right person for the debtor to pay or the situation in which the assignor might withdraw the notification. As to the knowledge of the validity of the assignment, it was pointed out in response that the issue of validity concerned the assignor and the assignee and not the discharge of the debtor’s obligation.

Paragraph (5)

183. It was noted that paragraph (5) was intended to address the issue of multiple simultaneous assignments of the same receivables by the assignor, while the issue of subsequent assignments was dealt with in draft article 25(4). In addition, it was noted that paragraph (5) was not intended to address the question of priority among several parties laying a claim on the assigned receivables, a question addressed in draft articles 21 to 24. While broad support was expressed in favour of paragraph (5), it was suggested, as a matter of drafting, that priority should be given to the assignee mentioned in the first notification, irrespective of whether notification was given by the assignor itself or by the assignee. Subject to that change, the Working Group approved the substance of paragraph (5).

Paragraph (6)

184. The Working Group decided to delete paragraph (6). As to the first sentence, a number of objections were raised, including: that it was superfluous in that it stated the obvious rule that the parties to the original contract could agree on the method of payment, and that it might be restrictive in that it referred to only two methods of payment, thereby excluding, for example, payment through the use of electronic data interchange.

185. The second sentence was also objected to on a number of grounds, including: that it was superfluous in that the assignee and the debtor could agree on a different method of payment in any case, if the change of the payment terms was agreeable to the debtor (e.g. payment in another currency available to the debtor); it was inappropriate in that it might inadvertently result in subjecting any change in the payment instructions made by the assignee to the consent of the debtor, an approach that would run counter to paragraph (2) as revised, and unduly interfere with current practices (see paragraphs 178-179, above); reference to a lock-box arrangement had already been included in draft article 15 (1)(b) by way of a ref-
ference to "the person" to whom or "the address" to which the debtor might pay (see paragraphs 169-171, above); and the concern about changes that might negatively affect the debtor's legal position (e.g. change in the country or the currency of payment) was already addressed in draft article 4 (see paragraphs 87-93, above).

Paragraph (7)

186. It was noted that paragraph (7) was predicated on the assumption that notification was given by the assignee and, as a result, the debtor should be entitled to some reassurance that an assignment had in fact taken place. Broad support was expressed in favour of the principle contained in paragraph (7) to the effect that, in the absence of "adequate proof" as to the status of the assignee, the debtor should be able to discharge its obligation by paying the assignor. It was pointed out that such an approach was consistent with current practice, in that a notification given by the assignee would contain an acknowledgement by the assignor, and, in the absence of such an acknowledgement, the debtor was entitled to request additional proof of the assignment. As to the options presented in paragraph (7) within square brackets, it was generally felt that they should be deleted for the same reasons the Working Group decided to delete those options in paragraph (4) (see paragraph 182, above).

187. With regard to the reference to "adequate proof" the concern was raised that it might not be readily understood in some legal systems and that it might, therefore, be replaced by a reference to "confirmation" by the assignor. In response, it was explained that the reference to "adequate proof", which was described in the last sentence of paragraph (7), was intended to introduce an objective test that would provide the certainty required for the protection of the debtor. The suggestion was made that a copy of the assignment document should also be considered as being "adequate proof". That suggestion was broadly supported.

188. In response to a question raised as to whether registration of the assignment could also serve as "adequate proof", it was noted that: the working assumption of the Working Group had been that a registration system would be relevant in the context of the effects of the assignment on third parties; if registration related to the assignment-transaction as a whole, it would not operate efficiently and would raise difficult legal issues; and if "registration" were limited to the filing of a notice about the assignment by the assignee, it would not constitute "adequate proof" for the purpose of the debtor's protection.

189. After discussion, the Working Group adopted paragraph (7), subject to the deletion of the bracketed language and the expansion of the notion of "adequate proof" to cover a copy of the assignment document.

Paragraph (8)

190. While broad support was expressed in favour of the principle contained in paragraph (8), it was generally felt that its scope should be expanded so as to cover other situations in which the debtor might be discharged under national law (i.e. by paying not only the assignee, but the right person, or into court or to a public deposit fund).

191. As to the exact formulation of paragraph (8), the suggestion was made that paragraph (8) might be cast as a positive discharge rule along the following lines: "In addition to discharge of the debtor provided by paragraphs (1) through (7) of this article, the debtor is discharged to the extent of payment: (a) to the person entitled to payment; and (b) to a competent judicial or non-judicial body or a public deposit fund (to the extent that such payment discharges the debtor under national law)." It was noted that the Working Group had decided to formulate paragraph (8) in a negative way in order to avoid any reference to "other applicable law" and to align that provision with article 8(2) of the Factoring Convention. After discussion, the Working Group approved the substance of paragraph (8) and requested the Secretariat to prepare a revised draft, taking into account the above suggestions.

General remarks

192. The view was expressed that requiring the assignee to be in a contracting State for the application of draft article 16 would amount to an unnecessary and excessive limitation of its scope of application. In addition, such an approach would lend itself to abuse on the part of assignees who would wish to avoid the application of the fundamental principle of debtor protection enshrined in draft article 16.

193. In view of the tentative decision of the Working Group to cover the assignment of insurance policies (see paragraph 59, above) and the possibility that deposit accounts might be also covered (see paragraph 61, above), the concern was expressed that a rule along the lines of draft article 16 might interfere with well-functioning practices in which debtors were not required to pay any person other than their clients (e.g. banks, insurance companies, brokerage firms). It was pointed out that such practices did not need to be covered at all by the draft Convention, since they were functioning well. However, if they were to be covered, they should be excluded from draft article 16, since otherwise the acceptability of the draft Convention might be reduced.

Article 17. Defences and set-offs of the debtor

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

"(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences of which the debtor could avail itself if such claim were made by the assignor.

"(2) The debtor may raise against the assignee any right of set-off in respect of claims existing against the assignor in whose favour the receivable arose that were available to the debtor at the time notification of the assignment was given to the debtor.

"(3) Notwithstanding paragraphs (1) and (2), defences and set-offs that the debtor could raise against the as-
assignor for breach of agreements prohibiting assignment pursuant to article 11 are not available to the debtor against the assignee.”

**Paragraph (1)**

195. It was noted that paragraph (1) dealt with defences of the debtor arising from the original contract. Broad support was expressed in favour of paragraph (1), which reflected an essential principle for the debtor’s protection, namely, that the debtor’s legal position should not be negatively affected as a result of the assignment. It was generally agreed that paragraph (1) covered all defences, including: contractual claims which, in some legal systems, might not be considered “defences”; rights for contract avoidance, e.g., for mistake, fraud or duress; exemption from liability for non-performance, e.g., because of an unforeseen impediment beyond the control of the parties (see United Nations Sales Convention, art. 79); and rights arising from pre-contractual dealings. After discussion, the Working Group adopted paragraph (1) unchanged.

**Paragraph (2)**

196. It was noted that paragraph (2) was intended to address rights of set-off arising from separate dealings between the assignor and the debtor. In addition, it was noted that the right of set-off of the debtor against the assignee was limited to those rights available to the time of notification, in order to protect the assignee from the consequences of dealings between the assignor and the debtor, of which the assignee could have no knowledge. The Working Group adopted paragraph (2) unchanged.

**Paragraph (3)**

197. It was recalled that a representation, undertaken by the assignor pursuant to draft article 13, that the debtor did not have any defences did not amount to a representation that there was no anti-assignment clause in the original contract. It was explained that, even if such an anti-assignment clause were to be included in the original contract, the assignor would not be breaching its obligation to the assignee, since, pursuant to paragraph (3), the debtor could not raise defences or set-offs against the assignee for violation of an anti-assignment clause. In the discussion, the view was expressed that a representation by the assignor as to the absence of any defences on the part of the debtor would be inappropriate in the context of tort receivables and that therefore a different rule had to be prepared to address representations in assignments of tort receivables. After discussion, the Working Group adopted paragraph (3) unchanged.

**Article 18. Modification of the original contract [and of the assignment]**

198. The text of draft article 18 as considered by the Working Group was as follows:

“(1) A modification of the original contract agreed upon between the assignor and the debtor [before notification of the assignment] is binding on the assignee and the assignee acquires corresponding rights under the modified contract.

“(2) A modification of the original contract, agreed upon between the assignor and the debtor after notification of the assignment, is binding on the assignee and the assignee acquires corresponding rights under the modified contract, if the modification is made in good faith and in accordance with reasonable commercial standards.

“(3) A modification of the assignment, agreed upon by the assignor and the assignee after notification of the assignment pursuant to article 15, is binding on the debtor only if the debtor is given notification of the modified assignment.”

**Paragraph (1)**

199. Broad support was expressed in favour of the retention of paragraph (1) with the bracketed language. It was generally felt that allowing the assignor and the debtor to modify their contract before notification was consistent with the principle embodied in draft article 16, namely that before notification the debtor could discharge its obligation by paying the assignor. As a matter of drafting, it was suggested that paragraph (1) might need to be modified so as to avoid giving the mistaken impression that the assignment created a contractual relationship between the assignee and the debtor. Subject to that suggestion, the Working Group adopted paragraph (1).

**Paragraph (2)**

200. It was noted that, under paragraph (2), modifications of the original contract agreed upon by the assignor and the debtor after notification of the assignment were binding on the assignee only if they were made in good faith or in accordance with reasonable commercial standards.

201. Differing views were expressed as to the condition under which a modification of the original contract after notification of the assignment should bind the assignee. One view was that such modifications should be subject to the general or specific consent of the assignee. In support of such an approach, it was observed that after notification, the assignee became part of a triangular relationship and its interests should also be taken into account, alongside the interests of the debtor and the assignor. In addition, it was pointed out that use of the terms “good faith” or “reasonable commercial standards” might introduce uncertainty since they were not universally understood in the same manner.

202. Another view was that modifications after notification should be binding on the assignee only if they were made in good faith and in accordance with reasonable commercial standards. It was stated that, while subjecting any modification of the original contract to the consent of the assignee might be appropriate in some cases (e.g., where the receivables assigned might have been fully earned and the assignment had been notified to the debtor), it would produce undesirable results in other cases (e.g., in the context of long-term contracts). In the latter cases, it was observed, it might be overly burdensome for the assignor to have to seek the assignee’s consent for every modification (e.g., replacement of equip-
The suggestion was made that further language along the lines “agreement not to raise defences” might be used instead of the term “waiver”, which could be misunderstood as referring to a unilateral act and one that did not require written form.

**Paragraph (1)**

207. The Working Group first considered the text in paragraph (1) to the notification of “the assignment or its modification”. Subject to that modification of draft articles 4 and 16, even if paragraph (3) were to be deleted, it was stated that it was unnecessary and might have the unintended result of increasing the cost of financing, in particular in transactions involving the assignment of a large number of low-value receivables. In addition, it was stated that, in case of a substantial modification amounting to a new assignment, a second notification would be necessary, by virtue of draft articles 4 and 16, even if paragraph (3) were to be deleted. In order to clarify the latter point, it was agreed that reference should be made in draft article 15(1) to the notification of “the assignment or its modification”. Subject to that modification of draft article 15(1), the Working Group decided to delete paragraph (3).

**Article 19. Waiver of defences and set-offs of the debtor**

205. The text of draft article 19 as considered by the Working Group was as follows:

“(1) [Without prejudice to [the law applicable to the relationship between the assignor and the debtor] [consumer-protection law],] the debtor may agree with the assignor or the assignee in writing to waive the defences and set-offs that it could raise under article 17. A waiver of defences and set-offs precludes the debtor from raising against the assignee those defences and set-offs.

“(2) The following defences may not be waived:

“(a) defences arising from separate dealings between the debtor and the assignee; and

“(b) defences arising from fraudulent acts on the part of the assignee [or the assignor].

“(3) A waiver of defences may only be modified by a written agreement.”

**Title**

206. As a matter of drafting, it was suggested that language along the lines “agreement not to raise defences” might be used instead of the term “waiver”, which could
defences that might not be waived should be listed along the lines of article 30(1)(c) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (hereinafter referred to as "the Bills and Notes Convention"). It was stated that one of the possible objectives of the draft Convention might be that receivables should be treated, to a large extent, like negotiable instruments. Accordingly, it was suggested that the draft Convention should afford the debtor the same protection afforded by the Bills and Notes Convention to the obligor in the context of a negotiable instrument. After discussion, the Working Group adopted subparagraph (b) unchanged and requested the Secretariat to consider including in paragraph (2) further defences along the lines of those listed in article 30(1)(c) of the Bills and Notes Convention.

Paragraph (3)

212. Broad support was expressed in favour of paragraph (3). It was pointed out that a requirement of written form for the waiver of defences was in the interest of certainty and predictability. In addition, it was stated that, if an assignee who extended credit in reliance on a waiver of the defences of the debtor were to find out that that waiver had been modified by the assignor and the debtor, certainty would be compromised and such a result might have an adverse impact on the availability and the cost of credit. In order to avoid that result, the suggestion was made that the modification of the waiver might need to be notified to the assignee. However, strong concerns were expressed with regard to introducing yet another requirement as to form. It was recalled that the Working Group had agreed that assignment and notification would have to be in writing and that the draft Convention's acceptability might be reduced if it were to be perceived as following an overly formalistic approach. After discussion, the Working Group adopted paragraph (3) unchanged.

Article 20. Recovery of advances

213. The text of draft article 20 as considered by the Working Group was as follows:

"Without prejudice to the debtor's rights under articles 4(2) and 17, failure of the assignor to perform the original contract, if any, does not entitle the debtor to recover a sum paid by the debtor to the assignee."

214. The Working Group found the substance of draft article 20 to be generally acceptable. It was noted that, after the decision of the Working Group to delete draft article 4(2) (see paragraph 94, above), the reference to that provision should be deleted on the understanding that the assignment did not prejudice the rights of the debtor against the assignor.

215. The suggestion was made that language along the lines of the opening words of draft article 19(1) as revised (see paragraphs 207-208, above) should be inserted at the beginning of draft article 20 as well. It was pointed out that, under certain consumer protection laws, the debtor might have a right to terminate the original contract and that, in such a case, the debtor might have a right to recover advances made to the assignee. Subject to that suggestion, the Working Group adopted draft article 20.

Article 21. Rights of third parties

216. The text of draft article 21 as considered by the Working Group was as follows:

"(1) Except as provided in articles 22 to 24, this Convention does not affect the rights of the assignees receiving the same receivables from the assignor, the assignor's creditors attaching the assigned receivables or the assignor's creditors in the context of insolvency of the assignor.

"(2) Notwithstanding articles 22 to 24, this Convention or the general principles on which it is based do not govern:

"(a) any right of creditors of the assignor attaching the assigned receivables to invalidate the assignment as a fraudulent transfer;

"(b) any right of the administrator in the insolvency of the assignor to invalidate the assignment as a fraudulent or preferential transfer;

"(c) the priority of the insolvency administrator for the benefit of privileged claims."

217. It was noted that draft article 21 was intended to function as an introduction to draft articles 22 to 24, which reflected the extent to which the draft Convention might affect the law applicable to the rights of third parties, including the creditors of the assignor in case of insolvency. Draft article 21 stated the rule that the draft Convention did not affect the rights of third parties and went on to list the exceptions to the rule set forth in draft articles 22 to 24. It was generally agreed that such exceptions, while they were necessary to provide minimum safeguards to the markets concerned, should be defined narrowly, so as not to compromise the acceptability of the draft Convention by interfering with national laws governing insolvency. As a matter of drafting, it was suggested that, to the extent possible, the provisions of draft articles 21 and 24 dealing with issues of insolvency might need to be combined as one single set of rules.

Paragraph (1)

218. The view was expressed that the words "this Convention does not affect the rights of the assignees" were insufficiently reflective of the policy that the rules of law applicable outside the draft Convention with respect to the matters specified in paragraph (1) should prevail over the draft Convention. It was suggested that wording along the following lines might be substituted for paragraph (1): "Except as provided in articles 22 to 24, the rights of the assignees receiving the same receivables from the assignor, the assignor's creditors attaching the assigned receivables or the assignor's creditors in the context of insolvency of the assignor are settled by the law governing insolvency".

219. With respect to the words "this Convention does not affect the rights of the assignees receiving the same receivables from the assignor", the view was expressed that, as currently drafted, paragraph (1) might be misin-
terpreted as placing all situations involving rights of several assignees outside the scope of the draft Convention. It was generally felt that paragraph (1) might need to be redrafted to indicate more clearly that the rights of each of the several assignees would be governed by the draft Convention and that the issues of competing rights of several assignees would be dealt with by draft article 22. After discussion, the Working Group approved the substance of paragraph (1) and requested the Secretariat to prepare a revised draft of paragraph (1), reflecting the above suggestions.

Paragraph (2)

220. It was noted that paragraph (2) listed some fundamental rights of third parties, which involved public policy considerations and which the draft Convention should not attempt to address. Those rights included: the right of individual creditors of the assignor to challenge the validity of assignments as a fraudulent transfer; the right of the administrator in the insolvency of the assignor to invalidate assignments as fraudulent or preferential transfers; and the priority of privileged claims (e.g. of the State for taxes and of employees for salaries and similar benefits).

221. While it was stated that the intended effect of paragraph (2) might implicitly flow from the operation of draft articles 22 to 24, it was generally agreed that a provision along the lines of paragraph (2) was needed to make it clear that the issues listed in subparagraphs (a) to (c) were left to the law applicable outside the draft Convention, and thus were not dealt with by draft articles 22 to 24.

Opening words

222. Differing views were expressed as to the question whether the reference to "the general principles" on which the draft Convention was based should be retained or deleted. One view was that such a reference was needed to make it clear that the general statement contained in draft article 6(2) with respect to the general principles on which the draft Convention was based (e.g. the observance of good faith in international trade) could not be regarded as entailing the application of the draft Convention under draft article 21 (e.g. in the case of fraudulent transfers dealt with in subparagraphs (a) and (b)). The prevailing view, however, was that the reference to the general principles on which the draft Convention was based should be deleted from draft article 21, since paragraph (2) was dealing with matters not governed by the draft Convention. After discussion, the Working Group decided that the words "or the general principles on which it is based" should be deleted.

Subparagraph (a)

223. The Working Group found the substance of subparagraph (a) to be generally acceptable. As to the scope of the provision, it was generally felt that there was no need for a restriction to those creditors of the assignor that "attaching the assigned receivables". Rather, the provision should be equally applicable to all creditors of the assignor who might have a "right to invalidate the assignment as a fraudulent transfer". The Working Group decided that the words "attaching the assigned receivables" should be deleted.

224. As a matter of drafting, it was agreed that the reference to "the right of creditors of the assignor to invalidate the assignment" might need to be rephrased to avoid creating the implication that the creditors of the assignor could directly invalidate the assignment. It was pointed out that, in most legal systems, the creditors of the assignor could only challenge the validity of the assignment, while the actual invalidation could only result from a decision by a court of justice. After discussion, the Working Group approved the substance of subparagraph (a) and requested the Secretariat to prepare a revised draft, reflecting the above-mentioned decisions.

Subparagraph (b)

225. The text of subparagraph (b) was found to be generally acceptable, subject to a modification along the lines adopted with respect to subparagraph (a) to avoid creating the impression that the administrator in the insolvency could, on its own authority, "invalidate" an assignment (see paragraph 224, above).

Subparagraph (c)

226. The Working Group found the substance of subparagraph (c) to be generally acceptable. However, the view was expressed that, while subordinating the rights of the assignee to the rights of holders of privileged claims was appropriate in case of an assignment by way of security, it might not be appropriate in case of an assignment by way of sale. It was stated that, in many legal systems, receivables assigned as security for indebtedness or other obligations before the opening of insolvency proceedings were included in the insolvency estate and were thus subject to privileged claims, while receivables sold were not part of the insolvency estate and should not be subordinated to privileged claims. For that purpose, it was suggested that a distinction should be drawn between assignments by way of sale and assignments by way of security. In support, it was observed that drawing such a distinction might be helpful for those countries where domestic law did not sufficiently recognize the actual sale of receivables and would accommodate significant practices, such as securitization, which involve sales of receivables. That suggestion was objected to on the ground that it would be inappropriate to attempt to introduce such a distinction, particularly in view of the numerous factual situations where it would be difficult to establish whether, in fact, the assigned receivables were used as security or were sold. It was recalled that, at its previous sessions, the Working Group had avoided to draw such a distinction since it found it to be problematic (A/CN.9/420, paras. 39 and 95 and A/CN.9/432, paras. 46 and 257).

227. After discussion, the Working Group approved the substance of subparagraph (c) and requested the Secretariat to add the words "where the assigned receivables constitute security for indebtedness or other obligations" between square brackets at the end of subparagraph (c) for consideration at a future session.
Future receivables

228. Differing views were expressed as to whether the effectiveness of the assignment of receivables not existing at the time of the commencement of the insolvency proceedings should be governed by the draft Convention.

229. One view was that the matter should be left to national law. It was stated that receivables arising, becoming due or being earned by performance after the commencement of the insolvency proceedings were considered, in many legal systems, to be part of the insolvency estate. In addition, it was observed that such receivables would normally be performed, if at all, by using value of the insolvency estate; and that the assignee would be unlikely to extend credit before, full or partial, performance of the original contract by the insolvency administrator on behalf of the assignor. Therefore, it was said, it would not be appropriate to remove those receivables from the insolvency estate or to give priority with regard to those receivables to the assignee over unsecured creditors. In line with that view, the suggestion was made that wording along the following lines should be inserted in paragraph (2): “the right of the administrator in the insolvency of the assignor to challenge the assignment of receivables that were future at the time of the commencement of the insolvency of the assignor”.

230. That suggestion was objected to on the ground that, once the draft Convention established the effectiveness of assignments of future receivables in draft article 8, it would be inappropriate to exclude from such a fundamental rule the most important cases in which such assignments needed to be validated, namely cases involving insolvency. It was observed that, under the laws of many countries, such an assignment would be effective only if it had taken place before the opening of a certain period, sometimes referred to as the “suspect period”, before the commencement of the insolvency proceedings. In addition, it was observed that, in view of the uncertainty prevailing in some legal systems as to the effectiveness of assignments of future receivables, it was of importance for the draft Convention to validate them. With a view to reflecting those observations, it was suggested that a provision determining the date of assignment might need to be introduced either in a separate paragraph of draft article 21 or in draft article 24, since it might need to be phrased as a positive rule under the draft Convention and not as an exception.

231. In the discussion, the view was expressed that it might be useful for the draft Convention to contain more detailed provisions on the issues of assignment of future receivables in the context of insolvency proceedings, since the draft Convention might have the opportunity to fill lacunae in many existing insolvency laws. It was widely felt, however, that, to the extent possible, the draft Convention should avoid interfering with domestic insolvency law, which might affect the acceptability of the draft Convention.

232. After discussion, the Working Group failed to reach agreement and requested the Secretariat to introduce wording within square brackets in draft article 21 and in draft article 24, reflecting the above-mentioned views for continuation of the discussion at a future session.

Other proposed additions to paragraph (2)

233. The Working Group next considered a number of suggestions with respect to the treatment of other insolvency-related issues under the draft Convention, for possible addition in paragraph (2) or elsewhere in the text.

234. One suggestion was that there should be a general rule that an assignee under the Convention should be treated no less favourably than a similarly situated assignee under domestic law. For example, if an assignee who had complied with provisions of domestic law to obtain priority over attaching creditors or an insolvency administrator would be treated in a certain way under domestic law, then an assignee who had complied with the provisions of the draft Convention to achieve that same priority should be treated at least as favourably. It was suggested that a rule of non-discrimination in national treatment would establish a minimum safeguard for assignees under the draft Convention. Broad support was expressed in favour of that suggestion.

235. Another suggestion was that paragraph (2) might need to further clarify that the draft Convention deferred to national laws on transfers that were fraudulent under national laws. Yet another suggestion was that the draft Convention might need to defer to national law certain questions relating to substantive insolvency law, such as: whether an assignment might be set aside as preferential; and whether an assignment of receivables that existed but were not earned by performance, fully or partially, at the commencement of the insolvency might be encumbered with the expenses of the insolvency administrator in performing those receivables for the benefit of the assignee.

236. A further suggestion, relating to procedural insolvency rules, was that, at least in the case where the assigned receivables were used as security for indebtedness or other obligations, the draft Convention should defer to national insolvency laws relevant to the following issues: whether assignees and creditors were stayed in the insolvency from collecting, applying or enforcing their security; whether the insolvency administrator might use the assigned receivables to operate the insolvent estate if the insolvency administrator provided replacement security to the assignee; whether the insolvency administrator might borrow against the assigned receivables to the extent that the value of the assigned receivables exceeded the obligations secured; and whether the assigned receivables might be charged by the insolvency administrator with privileged claims (e.g. taxes and wages). It was suggested that, if the Working Group were to decide that the assigned receivables might be charged with privileged claims, the Working Group might also wish to consider another anti-discrimination principle, namely, that the assignee’s security would have to be charged fairly and equitably with other security that might also be charged with privileged claims.

237. The Working Group took note of the above-mentioned suggestions and requested the Secretariat to...
introduce, to the extent possible, wording within square brackets in draft article 21 or draft article 24, reflecting those suggestions.

Article 22. Competing rights of several assignees

238. The text of draft article 22 as considered by the Working Group was as follows:

“(1) Where a receivable is assigned by the assignor to several assignees, priority is determined on the basis of time of [notification] [registration] of the assignment.

“(2) If no assignee registers the assignment, priority is determined on the basis of the time of notification of the assignment. If no assignee notifies the debtor, priority is determined on the basis of the time of assignment.”

Paragraph (1)

239. Differing views were expressed as to whether an assignee who had complied with the priority rule of the draft Convention would prevail over an assignee who had complied earlier with the priority rule existing under national law. It was noted that the question could arise in case the two priority rules differed and a conflict arose between a foreign and a domestic assignee of domestic receivables.

240. One view was that the draft Convention should establish a priority rule that would address all possible conflicts of priority among several assignees. It was stated that, if an assignee having complied with the priority rule of the draft Convention were to find itself subordinated to an assignee who had not complied with the draft Convention, the draft Convention would fail to achieve its goal of enhancing certainty and predictability as to the rights of third parties. As a result, it was said, the draft Convention would fail to increase the availability of lower-cost credit.

241. In addition, it was observed that failure to provide priority for a "Convention assignee" over an earlier "non-Convention assignee" would render the draft Convention ineffective in the world market. It was pointed out that, if all national priority systems were to prevail over the draft Convention, the uncertainty currently existing would remain, which would seriously compromise the usefulness of the draft Convention. It was stated, however, that while it would be desirable to include in the draft Convention a rule covering all conflicts of priority, failing to do so would somehow reduce but not defeat the usefulness of the draft Convention.

242. Another view was that conflicts of priority between foreign and domestic assignees of domestic receivables should not be covered. Granting priority to a foreign assignee (whose claim resulted from an assignment made later in time under the draft Convention) over a domestic assignee (whose claim resulted from an assignment made earlier in time under domestic law) could upset domestic financial markets. In response, it was observed that domestic assignees could be protected if they were to meet the requirements of the priority rule to be established by the draft Convention.

243. After discussion, the Working Group failed to reach agreement and requested the Secretariat to prepare a revised draft of paragraph (1), with possible variants, taking into account the views expressed.

244. The Working Group noted that, in the context of its discussion on draft article 3, the definition of "priority" had been reserved for future deliberation (see paragraph 85, above). However, for lack of sufficient time, the Working Group deferred its discussion of the definition of the term "priority" to a future session.

245. The Working Group next turned to the question of the basis for determining priority among several conflicting assignees (i.e. which party "had the right to receive payment of the receivables first in preference to other parties" under draft article 3(8)). It was noted that "priority" did not involve the validity of the assignment but rather the question as to which party would receive payment first, provided that it had a valid claim. Whether the party with priority would retain all the proceeds of payment or turn over any remaining balance after the satisfaction of its claim to the next party in line of priority depended on whether an assignment by way of sale or an assignment by way of security was involved, a matter left to other applicable law.

246. One view was that priority should be determined on the basis of the time at which the assignment was made. It was stated that such a rule would be consistent with the approach followed in draft article 8 with regard to the time of transfer of receivables. In addition, it was observed that such an approach would be in line with the rules followed, in many legal systems, with regard to the transfer of property. Moreover, while it was recognized that such an approach would afford very little or no protection to third parties, it was pointed out that there was no need to protect third parties over the first assignee in time. It was explained that good faith acquisition of rights in the assigned receivables by third parties could not be established and should, therefore, not be recognized.

247. It was observed that the crucial question related to the evidential way in which priority in time could be established. In order to address that question, the suggestion was made that a rule could be devised providing that the assignee who first registered, or, alternatively, notified the debtor would be presumed to be the first assignee in time. Any other assignee, who claimed to be the first assignee in time, would need to bear the burden of providing sufficient evidence of its priority.

248. It was stated that, in those legal systems that addressed issues of priority based on the time of the assignment, confidentiality of the financing transaction was a consideration of paramount importance and that any other approach would unduly interfere with well established non-notification finance practices. In addition, it was stated that the need for publicity of assignments was very limited and that, therefore, only limited information should be available and only to banks. In opposition to that view, it was pointed out that a publicity system would not necessarily interfere with non-notification finance practices since the identity of the debtor did not
need to be disclosed in the notice to be filed and that such a notice would not be sent to debtors. In addition, it was observed that a publicity system accessible only to banks, and not to all potential providers of credit, would fail to create certainty as to the rights of third parties and to generate new credit.

249. Another view was that priority should be determined on the basis of the time of notification of the debtor. It was observed that third parties should be able to obtain information about possible earlier assignments from the debtors. While it was accepted that such an approach could work well in the context of the assignment of small numbers of existing receivables, it was pointed out that notification of the debtor might not be an efficient or feasible way of determining priorities in case of bulk assignments of present and future receivables. It was explained that a number of difficulties would arise, including that: the identity of the debtors would not be known; the cost and time involved in notifying a significant number of debtors would be substantial; and third parties would be faced with the task of having to enquire about the status of the receivables with all those debtors, who would be under no obligation to respond.

250. Yet another view was that priority should be determined on the basis of an adequate publicity system, which would allow third parties a considerable degree of certainty and predictability as to whether they would be able to rely on receivables in deciding to extend credit. It was recalled that, at its previous session, the Working Group generally felt that the principal rule for determining priority should somehow provide for the publicity of the assignment, so as to avoid practical difficulties with respect to evidence of the various assignments involved (A/CN.9/432, para. 247). In addition, it was stated that, in practice, financing institutions would not be prepared to extend credit if they were unable to calculate the risk that another creditor might have priority, which would be the case in the absence of an adequate publicity system.

251. As to the specific type of the publicity system to be adopted, it was pointed out that, in order to avoid confusing a system aimed at resolving conflicts of priority among several assignees with the typical real estate registration, the term "notice filing system" should be used instead of the term "registration". It was explained that the basic difference was that filing of a notice about the assignment, as opposed to registering rights in real estate, was not a condition for the validity of the assignment, but only a condition for determining priority.

252. In addition, the view was expressed that whether the assignee with priority would retain the proceeds of the receivables depended on whether an assignment by way of sale or an assignment by way of security would be involved, which was left to other applicable law. Moreover, it was stated that, while a single international registry could be envisaged, other alternatives would include a combination of national filing systems and an international registry, or database. Such a filing system, if fully or partly computerized, would be time- and cost-efficient and reliable in filing, storing and accessing information filed. In that regard, the concern was expressed that establishing an electronic filing system might create difficulties for countries that did not have the necessary technology to implement it. On the other hand, it was observed that, without such a publicity system, the draft Convention would fail to generate new credit from bulk assignments for emerging markets.

253. After discussion, the Working Group failed to reach agreement and requested the Secretariat to prepare a revised version of paragraph (1), reflecting the views expressed.

*Paragraph (2)*

254. The Working Group decided to defer its discussion of paragraph (2), pending further consideration of paragraph (1).

*Article 23. Competing rights of the assignee and the assignor’s creditors*

255. The text of draft article 23 as considered by the Working Group was as follows:

"The assignee has priority over creditors of the assignor attaching the assigned receivables, if:

(a) the receivables [were assigned] [arose] [became due] [were earned by performance] [and [notification] [registration] of the assignment occurred] before attachment; or

(b) the assignee has priority under the law governing attachment."

256. It was noted that, under draft article 23, an assignee could establish priority over creditors of the assignor attaching the assigned receivables by meeting the test set forth in subparagraph (a) or by complying with the law governing attachment. Subparagraph (a) presented two alternatives. Under the first alternative, the assignee would prevail, if a particular event (i.e. conclusion of the assignment or the original contract, maturity of the receivable or performance of the original contract) had taken place before the attachment; under the second alternative, in addition to a particular event, a publicity requirement (i.e. notification or registration) would need to be met before the attachment for the assignee to establish its priority.

257. In addition, it was noted that minimum interference with the rights of the assignor’s creditors under the law governing the attachment would be achieved by a rule based on the time the receivables were earned by performance. Moreover, it was noted that such an approach would normally not undermine the protection of the assignee, since in practice assignees tended to extend credit upon, at least partial, performance of the contract from which the receivables would arise.

258. While some support was expressed for adopting a rule based on the time of assignment, for the same reasons that approach was supported in the context of draft article 22(1) (see paragraphs 246-248, above), the Working Group, for lack of sufficient time, deferred consideration of draft article 23 to a future session.
III. FUTURE WORK

259. Having exhausted the time available for deliberations at the current session, the Working Group deferred consideration of draft articles 24 to 25 to a future session and requested the Secretariat to revise draft articles 24 to 25, taking into account the deliberations and decisions of the Working Group on draft articles 1 to 23.

260. A number of issues were suggested for consideration during the upcoming deliberations of the Working Group. Those included: the question of which party needed to be in a contracting State for the draft Convention to apply; the problems resulting from the tentative decision to cover assignments of non-contractual receivables; the mandatory or non-mandatory character of individual provisions of the draft Convention; questions of conflicts of priority, including conflicts between a foreign and a domestic assignee of domestic receivables, insolvency-related issues; and conflict-of-laws issues.

261. In connection with the above-mentioned issues, reference was made to the utility of information, in particular regarding the experiences and needs of practitioners and other interested circles, that might be brought to the attention of the Working Group by the Secretariat, as well as by the members of the Working Group themselves as a result of consultations.

262. With regard to the conflict-of-laws issues, the Working Group decided that they should be addressed at the beginning of the next session of the Working Group on the basis of a revised version of the conflict-of-laws rules contained in document A/CN.9/WG.II/WP.87, to be prepared by the Secretariat, taking into account the comments of the Permanent Bureau of the Hague Conference on International Private Law (A/CN.9/WG.II/WP.90) and of other experts in the field of conflict-of-laws.

263. It was noted that the next session of the Working Group was scheduled to be held in New York from 23 June to 3 July 1997, those dates being subject to confirmation by the Commission at its thirtieth session.

D. Working papers submitted to the Working Group on International Contract Practices at its twenty-sixth session

1. Newly revised articles of draft convention on assignment in receivables financing:
   note by the Secretariat (A/CN.9/WG.II/WP.89) [Original: English]

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INTRODUCTION

1. At its twenty-eighth session, in 1995, the Commission discussed the topic of assignment in receivables financing and entrusted the Working Group on International Contract Practices with the work of preparing a uniform law on this topic.\(^1\)

2. The Working Group commenced this task at its twenty-fourth session by reviewing a number of draft uniform rules set forth in a report of the Secretary-General (A/CN.9/412). At the conclusion of the session, the Working Group requested the Secretariat to prepare a revised version of the draft uniform rules on the basis of the deliberations and decisions of the Working Group (A/CN.9/420, para. 204).

3. At its twenty-ninth session, in 1996, the Commission had before it the report of the Working Group on the work of its twenty-fourth session (A/CN.9/420). The Commission expressed its appreciation for the work accomplished and requested the Working Group to proceed with its work expeditiously.\(^2\)

4. At its twenty-fifth session, the Working Group considered a note by the Secretariat entitled “Revised articles of draft uniform rules on assignment in receivables financing” (A/CN.9/WG.III/WP.87). At that session, the Working Group decided to continue its work on the assumption that the rules would take the form of a convention aimed at harmonizing current law on assignment and related practices (A/CN.9/432, paras. 28 and 68).

5. The Working Group, which did not have sufficient time to discuss the conflict-of-laws provisions of the draft Convention, noted that the Hague Conference planned to prepare and submit to the Working Group for consideration at its next session a paper on conflict-of-laws issues in assignment and related aspects of insolvency law. At the conclusion of that session, the Working Group requested the Secretariat to prepare a revised version of the draft Convention on the basis of the deliberations and decisions of the Working Group (A/CN.9/432, para. 269).

6. The present note contains newly revised articles 1 to 25 of the draft Convention. Additions and modifications to the text are indicated by underlining. In line with the recent instructions relating to the stricter control and limitation of United Nations documents, the explanatory remarks to the draft provisions are as brief as possible. Reference is, therefore, made to the relevant documents. Additional explanations will be provided orally.

DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

PREAMBLE

The Contracting States,

Considering that international trade cooperation on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

Being of the opinion that the adoption of uniform rules governing assignments in receivables financing would facilitate the development of international trade and would promote the availability of commercial [and consumer] credit at more affordable rates,

Have agreed as follows:


Chapter I. Scope of application and general provisions

Article 1. Scope of application

(1) This Convention applies to assignments of international receivables and to international assignments of receivables (...), if

(a) [the assignor and the debtor have their places of business] [the assignor has its place of business]

in a Contracting State; or

(b) the rules of private international law lead to the application of the law of a Contracting State].
A receivable is international if the places of business of the assignor and the debtor are in different States. An assignment is international if the places of business of the assignor and the assignee are in different States.

If a party has more than one place of business, the place of business is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the conclusion of that contract. If a party does not have a place of business, reference is to be made to its habitual residence.


Remarks

1. At its previous session, the Working Group felt that, in determining which parties should have their places of business in a Contracting State, possible disputes to be addressed by the draft Convention should be considered (A/8N.9/432, para. 29). A provision requiring that all parties involved in an assignment have their places of business in a Contracting State would unnecessarily restrict the scope of application of the draft Convention, since most of the disputes identified at the previous session of the Working Group (most notably disputes relating to enforcement against the debtor and to the insolvency of the assignor) would be addressed by the draft Convention if only the assignor and the debtor were to have their places of business in a Contracting State.

2. It should be noted, however, that the identity of the debtor might not be known at the time of the assignment. The Working Group might, therefore, wish to consider providing that for the draft Convention to apply only the assignor should have its place of business in a Contracting State. Such an approach would emphasize what is true in receivables financing practice, namely that the most important problem is not the possibility that the assignee might not be able to collect some receivables in a pool of thousands of receivables, but rather that the whole pool might be lost to the assignee as a result of the intervention of the creditors of the assignor, in particular in case of insolvency. In addition, the interests of the debtor, whether located in a Contracting State or not, would be protected if debtor-protection in the draft Convention were to be so inadequate as to run counter to public policy considerations of the law of the State in which the debtor might be located.

3. In its consideration of paragraph (1)(b), the Working Group might wish to take into account article 2(1)(b) of the UNIDROIT Convention on International Factoring (Ottawa, 1988; hereinafter referred to as “the Factoring Convention”), which provides for the application of the Convention in case both the sales contract and the factoring contract are governed by the law of a Contracting State.

4. In the context of its discussion of draft article 1, the Working Group might wish to review its working assumption that the draft Convention would harmonize and replace national law on assignment and related practices, rather than create a new type of assignment, leaving it to the parties to opt in the draft Convention (A/8N.9/432, paras. 67-69). At its previous session, the Working Group felt that a general opting-out, or an opting-in, provision might compromise certainty and predictability as to the rights of third parties (A/8N.9/432, paras. 33-38 and 67-69). This problem would not arise, however, if the assignor and the assignee were allowed to exclude the application of those provisions of the draft Convention that govern their mutual rights and obligations (this is the case with draft articles 11, 12(2) and (3), 13 and 14, while a determination has to be made in draft article 12(1) as to whether the draft Convention or the agreement of the parties should prevail in case of conflict).

5. Paragraph (3) has been modelled on article 10 of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as “the United Nations Sales Convention”). The reference to the parties of the “relevant contract” is intended to refer to the parties of the contract the internationality of which would be at question in each particular case (i.e. the original contract, the financing contract or the assignment). The Working Group might wish to consider whether the term “relevant contract” is sufficient to indicate the assignment in case there is no financing contract. In addition, the Working Group might wish to address the question whether, in determining “the relevant place of business”, regard is to be had to any stipulations of the parties.

6. Moreover, the Working Group might wish to consider additional connecting factors for the territorial application of the draft Convention, including: seat, in order to cover situations in which a Government or governmental entity is involved; and place of registration or mailing address, in order to cover companies without a fixed place of business (e.g. post-office-box companies).

Article 2. Exclusions

This Convention does not apply to assignments:

(a) for personal, family or household purposes;
(b) between individuals as gifts;
(c) solely by endorsement of a negotiable instrument or delivery of a bearer document;
(d) by operation of law;
(e) that are part of the sale of a business out of which the assigned receivables arose;
(f) of receivables owed by individuals;
(g) of receivables from employment relationships;
(h) of receivables from contracts under which the assignee is to perform the contract;
(i) of receivables from reinsurance contracts;
(j) of receivables from lease agreements relating to real estate and equipment;
(k) of receivables from deposit accounts.

Remarks

1. In view of its decision to delete any reference to the financing purpose or context of assignment, the Working Group requested the Secretariat to introduce a list of assignments, receivables and parties to be excluded from the scope of the draft Convention (A/CN.9/432, paras. 18 and 66). Draft article 2 has been prepared pursuant to that request. Its contents appear within square brackets, since they are based on tentative suggestions made at the previous session of the Working Group (A/CN.9/432, paras. 59, 63 and 65).

2. In particular with regard to receivables owed by individuals, the Working Group at its previous session failed to reach agreement as to whether they should be covered (A/CN.9/432, paras. 36, 64 and 234-238).

3. The main aim of an exclusion of receivables owed by individuals would be to avoid conflicts between the provisions of the draft Convention relating to the rights and obligations of the debtor and consumer-protection principles. Such an exclusion, however, would present a number of disadvantages, most notably that: it would exclude a substantial practice, i.e. the securitization of credit card receivables, which allows consumers access to lower cost credit; and it would have the unintended effect of excluding receivables owed by individual merchants (the term "individuals" is used in order to avoid having to define and draw a distinction between "consumers" and "merchants", terms that are not universally understood in the same manner).

4. A more appropriate approach might be to establish in the draft Convention an adequate debtor-protection system aimed at ensuring that the debtor's legal position is not changed as a result of the assignment, and that the debtor knows whom to pay in order to discharge its obligation. Such an approach could include the right of the consumer-debtor to discharge its obligation by paying to the bank account or post-office box specified by the assignor, a practice already followed in the context of credit card receivables. Another approach would be to indicate in the draft Convention that it does not override consumer-protection laws (A/CN.9/432, para. 237).

Article 3. Definitions

For the purposes of this Convention:

(1) "Assignment" means the (...) transfer by [written] agreement [of one or more, existing or future,] receivables[, or of partial and undivided interests in receivables,] from one or more parties ("assignor") to another party or parties ("assignee"), by way of sale, by way of security for performance of an obligation, or by any other way (...) [including subrogation, novation or pledge of receivables].

(2) "Receivables financing" means any transaction in (...) which value, credit or related services are provided for value in the form of receivables. "Receivables financing" includes, but is not limited to, factoring, forfaiting, securitization, project financing and refinancing.)

(3) "Receivable" means any right of the assignor or another party or parties to receive or to claim payment of a monetary sum from another party or parties (...).

(4) "Original contract" means a contract from which a receivable arises. [A receivable "arises" when the original contract is concluded; when it becomes payable; [when it is earned by performance] [when it accrues]].

(5) "Future receivable" means a receivable that might arise after the conclusion of the assignment.

(6) "Writing" means any form of communication that preserves a complete record of the information contained therein and provides authentication of its source by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.

(7) "Notification of the assignment" means a statement informing the debtor that an assignment has taken place.

(8) "Priority" means the right of a party to receive payment in preference to another party.


Remarks

1. Paragraph (1) introduces a broad definition of "assignment", generally supported at previous sessions of the Working Group (A/CN.9/420, para. 39 and A/CN.9/432, para. 45).

2. The reference to "written" assignments in paragraph (1) has been inserted pursuant to a suggestion made at the previous session of the Working Group (A/CN.9/432, para. 42). Such an approach, which is an additional alternative to those set out in draft article 7, would result in excluding oral assignments from the scope of application of the draft Convention.

3. In support of such an approach, it could be argued that it might discourage the practice of oral assignments thus protecting all parties concerned from the uncertainty arising in the context of oral assignments. However, such a protection might be unnecessary, since the parties to financing transactions are normally able to protect their own interests; the debtor is protected in any case since requiring the filing in a public registry, not of the assignor but of the assignee. Such a protection might be unnecessary, since the parties to financing transactions are normally able to protect their own interests; the debtor is protected in any case since...

4. The Working Group might wish to consider the question whether, in view of the broad approach followed in the definition of "receivable", the reference to certain...
types of receivables in paragraph (1) might be deleted. In addition, the Working Group might wish to consider the question whether the same result would be achieved without an explicit reference to subrogation, novation, or pledge.

5. With regard to paragraph (2), the Working Group might wish to consider the question whether it should be retained or deleted after having considered the title, the preamble and draft article 12(3), in which a reference to receivables financing is currently included. Should the Working Group decide to delete paragraph (2), it might wish to preserve at the appropriate place in the draft Convention certain elements the importance of which was emphasized at the previous session of the Working Group, i.e. the emphasis on assignments for obtaining services (e.g. accounting, collection, insurance) and the possibility that the assignor and the borrower under the financing contract may be different persons (A/CN.9/432, para. 50). Should the Working Group decide to retain paragraph (2), consideration might be given to the question whether the definition of “receivables financing” in its present formulation might be too broad, thus inadvertently resulting in covering transactions that should not be covered, e.g. cash-management transactions.

6. The definition of “receivable” in its present formulation, separated from the definition of the “original contract”, is intended to cover both contractual (whether earned by performance or not) and non-contractual receivables, including damages of any nature, as well as receivables payable in any currency. In addition, it is intended to cover both receivables in a strict sense (“the right to claim”) and proceeds of receivables (“the right to receive”). The language in square brackets, while not setting forth a definition but a rule of interpretation, is aimed at explaining a term used throughout the draft Convention (i.e. “a receivable arises”). The reference to a claim “accruing” was drawn from the Convention on the Limitation Period in the International Sale of Goods (New York, 1974; article 9). If such a reference were to be retained, it might need to be supplemented by a provision along the lines of article 10 of that Convention specifying when a claim “accrues”.

7. The Working Group might wish to consider the question whether rights to payment in precious metals or in units of account should also be covered. In addition, the Working Group might wish to address particular issues arising in assignments of partial or undivided interests in receivables, including: the definition of “parts” of receivables, or the minimum units, that could be assigned; the question whether the debtor’s consent should be necessary for such an assignment to be effective; the question whether the debtor should be able to discharge its debt by depositing the amount owed in a bank account or by mailing it to a post office box; and the issue of the assignee’s protection from creditors of the assignor (A/CN.9/420, paras. 180-184).

8. The term “notification of the assignment” has been defined in view of the fact that the term is used throughout the draft Convention (see also draft article 15 which deals with the content of the notification and the question whether notification may relate to receivables not existing at the time of notification).

9. The Working Group might wish to consider paragraph (8) in the context of its discussion on draft articles 22 to 24, in which the term “priority” is used. In the same context, the Working Group might wish to address the question whether use of the term “priority” is appropriate in the context of both assignments by way of sale and assignments by way of security.

Article 4. Debtor’s protection

(1) An assignment does not have any effect on the debtor’s duty to pay except that upon receipt of notification of the assignment the debtor is entitled to discharge its obligation, subject to article 16, by paying the assignee.

(2) An assignment does not prejudice the debtor’s rights against the assignor arising from the failure of the assignor to perform the original contract (…).

References: A/CN.9/432, paras. 87-92 and 244 (twenty-fifth session, 1996)
A/CN.9/WG.ILWP.87, draft article 6(1)(b) and 17(2)

Remarks

1. Draft article 4 reflects a fundamental principle, embodied also in draft articles 16 and 17, that attracted broad support at the previous session of the Working Group (A/CN.9/432, paras. 89 and 244).

2. Paragraph (1) is aimed at establishing that the only effect of the assignment towards the debtor is a change in the identity of the creditor, which, subject to draft article 16, may result in a change in the way in which the debtor may discharge its obligation. The payment obligation, including the amount to be paid, the time, place and currency of payment, and the defences of the debtor should not be adversely affected.

3. The Working Group might wish to consider whether paragraph (1) might be inconsistent with draft article 18, in that, after e.g. a reduction in the price under the original contract, the debtor might have to pay the original, higher price, unless the condition set forth in paragraph (2) of draft article 18 is met.

4. Paragraph (2), which is predicated on the assumption that the obligation to perform the original contract remains with the assignor, is intended to preserve any rights that the debtor might have against the assignor for failure of the assignor to perform the original contract. Those rights, however, may not be raised against the assignee (unless they form defences in accordance with draft article 17). Draft article 20, for example, provides that the debtor may not recover from the assignee advance payments made by the debtor to the assignee.

5. An adequate legal regime for the protection of the debtor might allay the concerns expressed at previous
sessions of the Working Group with regard to covering international assignments of domestic receivables, and in particular of receivables owed by consumers (A/CN.9/420, paras. 24, 27-29 and 159 and A/CN.9/432, paras. 17, 21, 36 and 236-238). The change in the legal regime governing the debtor's obligation should be of no concern to the consumer/debtor as long as this legal regime adequately protects the consumer/debtor's interests. In addition, such a debtor-protection regime might enhance the acceptability of provisions on oral assignments, bulk assignments of future receivables, anti-assignment clauses and registration (see remark 4 to draft article 2).

Article 5. International obligations of the Contracting State

This Convention does not prevail over any international agreement which has been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the assignor and the debtor have their places of business in States parties to such agreement.

References: A/CN.9/432, paras. 73-75 (twenty-fifth session, 1996)
A/CN.9/WG.II/WP.87, draft article 3
A/CN.9/420, para. 23 (twenty-fourth session, 1995)

Remarks

The Working Group might wish to consider whether draft article 5 should be aligned with draft article 1(1)(a) in terms of which party has to have its place of business in a State party to the international agreement that should prevail over the draft Convention.

Article 6. Principles of interpretation

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

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

A/CN.9/WG.II/WP.87, draft article 4
A/CN.9/420, para. 190 (twenty-fourth session, 1995)

Chapter II. Form and content of assignment

Article 7. Form of assignment

Variant A

An assignment need not be effected in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Variant B

An assignment in a form other than in writing is not effective [towards third parties]. [If the assignment is at some point of time effected in or evidenced by writing, it becomes effective as of that time.]

References: A/CN.9/432, paras. 82-86 (twenty-fifth session, 1996)
A/CN.9/WG.II/WP.87, draft article 5
A/CN.9/420, paras. 75-79 (twenty-fourth session, 1995)
A/CN.9/412, draft article 5

Article 8. Time of transfer of receivables

1. A receivable arising up to the time of assignment is transferred at the time of assignment.

2. Without prejudice to the rights of the assignor's creditors, a future receivable is transferred directly to the assignee [when it is assigned] [when it arises] [when it becomes payable] [when it is earned by performance], without the need for a new assignment.

A/CN.9/WG.II/WP.87, draft article 7(1) and (3)
A/CN.9/420, paras. 57-60 (twenty-fourth session, 1995)
A/CN.9/412, draft article 3(2)

Remarks

1. For reasons of clarity, draft article 7 of the earlier version of the rules has been split into two separate articles, draft articles 8 and 9. The purpose of draft article 8 is to address a question of paramount importance, i.e. the question of the point of time at which the transfer of receivables becomes effective.

2. While paragraph (1) states an obvious rule, it has been included in draft article 8 for reasons of completeness. In paragraph (2), which presents four alternatives, the Working Group might wish to further specify the exact time of transfer by reference to a date, e.g. the date mentioned in the assignment, the financing contract or the original contract, if any, or the date of acceptance of an offer.

3. Depending on the approach to be taken in paragraph (2) with regard to the time of transfer of future receivables, the definition of “future receivable” might need to be adjusted.

4. The Working Group might wish to consider the question whether the effect of assignment might need to be explicitly stated in a substantive provision, despite the fact that “assignment” is defined as the transfer of receivables by agreement and that draft articles 8 and 9 implicitly state the effect of assignment.
Article 9. Bulk assignments

(...) Without prejudice to the rights of the assignor's creditors, future receivables that are not specified individually are transferred, if they can be identified as receivables to which the assignment relates either at the time agreed upon by the assignor and the assignee, or in the absence of such agreement, when the receivables arise (...).

A/CN.9/WG.II/WP.87, draft article 7(2)
A/CN.9/420, paras. 45-56 (twenty-fourth session, 1995)
A/CN.9/412, draft article 3(1)

Remarks

Under draft article 9, the only condition of the transfer of future receivables in bulk is that they are identifiable at some point of time. The exact time for this identification is left to the discretion of the parties. This approach does not prejudice the rights of the debtor since the notification has reasonably to identify the receivables assigned. It does not prejudice the rights of the assignor's creditors either, because they are expressly excluded from draft article 9.

Article 10. Agreements prohibiting assignment

(1) A receivable is transferred to the assignee notwithstanding any agreement between the assignor and the debtor prohibiting assignment.

(2) Nothing in this article affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of an agreement prohibiting assignment, but the assignee is not liable to the debtor for such a breach.

References: A/CN.9/432, paras. 113-126 (twenty-fifth session, 1996)
A/CN.9/WG.II/WP.87, draft article 8
A/CN.9/420, paras. 61-68 (twenty-fourth session, 1995)
A/CN.9/412, draft article 4

Remarks

1. Paragraph (2) is intended to cover both contractual liability and liability for tortious interference in the contractual relationship between the assignor and the debtor. The rule in paragraph (2) is supplemented by draft article 17(3), which provides that the debtor may not raise against the assignee the breach as a defence or set-off against the assignee damages arising from the breach.

2. The Working Group might wish to address a number of related questions, including: whether agreements limiting the right of the creditor to assign its receivables should be covered (e.g., one assignment is allowed but no more); and whether, in case of breach of an agreement allowing only one assignment, some types of debtors (e.g., Governments) should be allowed to discharge their obligation by paying the assignor.

Article 11. Transfer of security rights

(1) Unless otherwise provided by (...) law or by agreement between the assignor and the assignee, any (personal or property) rights securing the assigned receivables are transferred to the assignee without a new act of transfer.

(2) Paragraph (1) of this article does not affect any requirement relating to registration of any security rights.

A/CN.9/WG.II/WP.87, draft article 9
A/CN.9/420, paras. 69-74 (twenty-fourth session, 1995)

Chapter III. Rights, obligations and defences

Article 12. Rights and obligations of the assignor and the assignee

[(1) [Subject to the provisions of this Convention,] the rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules, general conditions or usages (...) referred to therein (...).]

(2) The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices which they have established between themselves.

(3) The assignor and the assignee are considered, unless otherwise agreed, to have impliedly made applicable to the assignment 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 receivables financing practice.

References: A/CN.9/432, paras. 131-144 (twenty-fifth session, 1996)
A/CN.9/WG.II/WP.87, draft article 10
A/CN.9/420, paras. 73, 81, 95 (twenty-fourth session, 1995)

Remarks

1. The Working Group might wish to consider the question whether, in case of conflict, the draft Convention or the agreement of the parties should prevail. It should be noted that, with the exception of the provisions dealing with form of the assignment, the provisions of the draft Convention dealing with the rights of the assignor and the assignee may be varied by agreement (draft articles 11, 12(2) and (3), 13 and 14(1)).

2. Paragraphs (2) and (3) are modelled on article 9 of the United Nations Sales Convention.
Article 13. Representations of the assignor

(1) Unless otherwise (...) agreed between the assignor and the assignee, the assignor represents that the assignor is, at the time of assignment, or will later be, the creditor, and that the debtor does not have, at the time of assignment, defences or set-offs that could [deprive the assigned receivables of value] [defeat, in whole or in part, the right of the assignee to request payment].

(2) Unless otherwise (...) agreed between the assignor and the assignee, the assignor does not represent that the debtor will pay (...).

A/CN.9/WG.II/WP.87, draft article 11
A/CN.9/420, paras. 80-88 (twenty-fourth session, 1995)
A/CN.9/412, draft article 6

Remarks

1. Paragraph (1) provides for two types of representations: representations as to the ownership in the receivables, for which there was broad support at the previous session of the Working Group, and representations as to defences of the debtor under the original contract, which raised a number of concerns (A/CN.9/432, para. 149).

2. The new wording in paragraph (1) is intended to address a concern expressed at previous sessions of the Working Group that a reference to deprivation of "value" could be misunderstood as referring to economic value and not to defences legally defeating the claim of the assignee (A/CN.9/420, para. 87 and A/CN.9/432, para. 153). Should the Working Group decide to retain the representation as to defences of the debtor that are unknown to the assignee and prefer the reference to deprivation "of value", some clarification would need to be made as to whether any, or only a substantial, decrease in the amount of the assigned receivables would amount to a breach of the representation.

Article 14. Assignee's right to notify the debtor and to request payment

(1) Unless otherwise agreed between the assignor and the assignee, the assignee is entitled to give to the debtor notification of the assignment and to request payment of the receivables assigned (...).

(2) If the assignee gives notification of the assignment to the debtor in violation of an agreement between the assignor and the assignee prohibiting or restricting notification, the notification is effective but the assignee may be liable to the assignor for breach of contract.

References: A/CN.9/432, paras. 159-164 (twenty-fifth session, 1996)
A/CN.9/WG.II/WP.87, draft article 12
A/CN.9/420, paras. 89-97 (twenty-fourth session, 1995)
A/CN.9/412, draft article 7

Remarks

Paragraph (2) is intended to address the question whether a notification given in violation of an agreement between the assignor and the assignee precluding or restricting the assignee from notifying the debtor should be effective. It is based on general principles of contract law, namely that: agreements bind only the parties thereto; and that their violation may result in the defaulting party becoming liable to the other party for breach of contract. As a result, if the debtor receives notification from the assignee which conforms to the requirements set forth in draft article 15, it should be entitled to pay the assignee and be discharged.

Article 15. Notification of the debtor

(1) Notification of the assignment shall:
   (a) be given in writing to the debtor by the assignor or by the assignee; and
   (b) reasonably identify the receivables assigned and the person to whom or for whose account the debtor is required to make payment.

(2) Notification of the assignment may relate to receivables arising after notification.

A/CN.9/WG.II/WP.87, draft article 13(2)
A/CN.9/420, paras. 116-123 (twenty-fourth session, 1995)
A/CN.9/412, draft articles 9(2)

Remarks

1. Paragraph (1) has been prepared pursuant to the suggestions made at the previous session of the Working Group with regard to draft article 13(2) (A/CN.9/432, paras. 173-184).

2. Under paragraph (2), notification of the assignment of receivables not existing at the time of notification may be validly given. However, in order to avoid an excessive restriction of the economic autonomy of the assignor, the Working Group might consider limiting the rule in paragraph (2), e.g. to receivables arising within a certain time-period after notification.

Article 16. Debtor's discharge

(1) Until the debtor receives notification of the assignment pursuant to article 15, it is entitled to discharge its obligation by paying the assignor.

(2) After the debtor receives notification of the assignment pursuant to article 15, subject to paragraph (3), it is entitled to discharge its obligation by paying the assignee.

(3) Notwithstanding notification of the assignment pursuant to article 15, the debtor shall discharge its obligation by paying the assignor, if:
   (a) the debtor has actual knowledge of the invalidity of the assignment; and
(b) the debtor is instructed in the notification to continue paying the assignor.

(4) Notwithstanding notification of the assignment pursuant to article 15, if the debtor receives notification of a prior assignment pursuant to article 15, or of measures aimed at attaching the assigned receivables, including but not limited to judgements or orders issued by judicial or non-judicial bodies, as well as of measures effected by operation of law, in particular in case of insolvency of the assignor, it is entitled to discharge its obligation by depositing the amount owed with a public deposit fund [seek instructions from a competent judicial or non-judicial body and pay as instructed].

(5) In case the debtor receives notification pursuant to article 15 of more than one assignment of the same receivables made by the same assignor, the debtor is entitled to discharge its obligation by paying the first assignee to give notification of the assignment pursuant to article 15 and has against that assignee the defences and set-offs provided for under article 17.

(6) If so agreed between the assignor and the debtor before notification of the assignment pursuant to article 15, the debtor is entitled to discharge its obligation by paying into a bank account or a post office box specified in the agreement. After notification of the assignment pursuant to article 15, the debtor and the assignee may agree on the method of payment.

(7) If requested by the debtor, the assignee must furnish adequate proof that the assignment has taken place. If the debtor requests payment of the assignor, the assignee is entitled to pay the assignor and be discharged from liability [deposit the amount owed with a public deposit fund] [seek instructions from a competent judicial or non-judicial body and pay as instructed]. Adequate proof includes, but is not limited to, any document emanating from the assignor and indicating that the assignment has taken place.

(8) Paragraph (2) of this article does not prejudice any other ground on which payment by the debtor to the assignee discharges the debtor's obligation.

A/CN.9/WG.11/WP.87, draft article 13
A/CN.9/412, draft articles 9 and 15(2)

Remarks

1. Pursuant to a decision made by the Working Group at its previous session, the focus of draft article 16 has been changed from the debtor's duty to pay to the debtor's discharge (A/CN.9/432, para. 181).

2. Paragraphs (1) and 2 are intended to establish a clear and simple rule for the debtor's discharge based on an objective criterion, notification of the assignment. Introducing a subjective criterion, e.g. knowledge of the assignment, would place on the debtor the burden of having to keep a record of possible assignments and could undermine the certainty necessary in a debtor's discharge rule. Both under paragraphs (1) and (2), the debtor is not precluded from paying based on its knowledge of the relevant facts. But, if the debtor chooses to do so, it bears the risk of having to pay twice

3. Paragraph (3) introduces two exceptions to that rule, namely the case in which the debtor has "actual knowledge" of the invalidity of assignment and the case in which the debtor is instructed to continue paying the assignor.

4. The first exception has been inserted pursuant to a suggestion made at the previous session of the Working Group that attracted some support (A/CN.9/432, para. 189). It appears within square brackets in view of the concerns expressed at previous sessions of the Working Group with regard to introducing a subjective criterion in a debtor-protection rule (A/CN.9/420, paras. 99-104 and A/CN.9/432, paras. 167-171 and 189-192). The main advantage of a provision along the lines of paragraph (3)(a) is that it places emphasis on the need to make business practice conform with good faith standards. Its main disadvantage is that it introduces uncertainty and invites costly litigation, since it raises a number of questions, including what constitutes knowledge, who has to prove it, what is its content (e.g. invalidity as a matter of law or as a matter of fact) and how knowledge is to be treated in case of several conflicting assignments. The second exception is intended to accommodate certain practices, e.g. securitization, in which the assignee, a special corporation established for the sole purpose of issuing and selling securities, does not have the structure geared to receiving payments.

5. In both cases, the debtor does not have a right but an obligation to pay the assignor. It would run counter to good faith standards to allow the debtor, who has actual knowledge of the assignment, to discharge its obligation by paying the assignee. In addition, allowing the debtor to pay the assignee when otherwise instructed would create obstacles to securitization practices.

6. Paragraphs (4) to (8) deal with particular cases in which the debtor may discharge its obligation in different ways. The Working Group might wish to consider whether all the ways for the debtor to discharge its obligation set forth in paragraphs (4) and (7) should be retained and, if so, whether they should be made available to the debtor alternatively or cumulatively, leaving the choice to the debtor (A/CN.9/432, paras. 199-202).

7. Paragraph (8), which originates from draft article 13(5) of the earlier version of the rules, is intended to avoid creating the risk that the discharge mechanisms established by the draft Convention might inadvertently exclude, for formal reasons (e.g. because notification did not conform with draft article 15), other grounds for discharge of the debtor through payment to the assignee.

Article 17. Defences and set-offs of the debtor

(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise
against the assignee all defences (...) of which the debtor could avail itself if such claim were made by the assignor.

(2) The debtor may raise against the assignee any right of set-off in respect of claims existing against the assignor in whose favour the receivable arose (...) that were available to the debtor at the time notification of the assignment was given to the debtor.

(3) Notwithstanding paragraphs (1) and (2), defences and set-offs that the debtor could raise against the assignor for breach of agreements prohibiting assignment pursuant to article 11 are not available to the debtor against the assignee.

A/CN 9/WG.II/ WP.87, draft article 14.
A/CN.9/420, paras. 132-151 (twenty-fourth session, 1995)
A/CN.9/412, article 10

Article 18. Modification of the original contract and of the assignment

(1) A modification of the original contract agreed upon between the assignor and the debtor (before notification of the assignment) is binding on the assignee and the assignee acquires corresponding rights under the modified contract (...).

(2) A modification of the original contract, agreed upon between the assignor and the debtor after notification of the assignment, is binding on the assignee and the assignee acquires corresponding rights under the modified contract, if the modification is made in good faith and in accordance with reasonable commercial standards.

(3) A modification of the assignment, agreed upon by the assignor and the assignee after notification of the assignment pursuant to article 15, is binding on the debtor only if the debtor is given notification of the modified assignment.

A/CN.9/WG.II/ WP.87, draft article 15

Remarks

1. Under paragraph (1), any modification of the original contract agreed upon by the assignor and the debtor would bind the assignee, in any case or only before notification. Limiting the right of the assignor and the debtor to modify the original contract might not be fully consistent with the rule in draft article 4 that the assignment should not negatively affect the legal position of the debtor. Therefore, the reference to notification in paragraph (1) and paragraph (2) as a whole appear within square brackets.

2. Under paragraph (2), a modification of the original contract would be binding on the assignee only if made in good faith and in accordance with reasonable commercial standards. If made in good faith a modification would bind the assignee even if modifications were to be prohibited in the assignment.

3. Paragraph (3) has been prepared pursuant to a request made by the Working Group at its previous session (A/CN.9/432, para. 217). It provides that in case of a modification of the assignment a second notification would be necessary. Paragraph (3) might not be necessary. If the modification is of minor importance, a second notification would be unnecessary and would have the unintended result of increasing the cost of financing, in particular in transactions involving the assignment of a large number of low-value receivables; and if the modification is so substantial as to amount to a new assignment, a second notification would be necessary in any case.

Article 19. Waiver of defences and set-offs of the debtor

(1) [Without prejudice to [the law applicable to the relationship between the assignor and the debtor] [to consumer-protection law,] the debtor may agree with the assignor or the assignee in writing to waive the defences and set-offs that it could raise under article 17. A waiver of defences and set-offs precludes the debtor from raising against the assignee those defences and set-offs.

(2) The following defences may not be waived:

(a) defences arising from separate dealings between the debtor and the assignee; and

(b) defences arising from fraudulent acts on the part of the assignee or the assignor.

(3) A waiver of defences may only be modified by a written agreement.

References: A/CN.9/432, paras. 218-238 (twenty-fifth session, 1996)
A/CN.9/WG.II/ WP.87, draft article 16
A/CN.9/420, 136-144 (twenty-fourth session, 1995)
A/CN.9/412, draft article 11

Remarks

1. The Working Group might wish to address the question whether the application of draft article 19 should be subject to other rules of law and if so to which, the law applicable to the original contract in general or just the applicable consumer-protection law (A/CN.9/432, paras. 230 and 237).

2. An additional question that the Working Group might wish to consider is whether draft article 19 should recognize blanket waivers, covering all possible defences, or whether the defences to be waived should be identified in some way.

Article 20. Recovery of advances

Without prejudice to the debtor’s rights under articles 4(2) and 17, failure of the assignor to perform the original contract, if any, does not entitle the debtor to recover a sum paid by the debtor to the assignee.
Article 21. Rights of third parties

(1) Except as provided in articles 22 to 24, this Convention does not affect the rights of the assignees receiving the same receivables from the assignor, the assignor's creditors attaching the assigned receivables or the assignor's creditors in the context of insolvency of the assignor.

(2) Notwithstanding articles 22 to 24, this Convention or the general principles on which it is based do not govern:

(a) any right of creditors of the assignor attaching the assigned receivables to invalidate the assignment as a fraudulent transfer;

(b) any right of the administrator in the insolvency of the assignor to invalidate the assignment as a fraudulent or preferential transfer;

(c) the priority of the insolvency administrator for the benefit of privileged claims.

References: A/CN.9/432, paras. 239-244 (twenty-fifth session, 1996)
A/CN.9/WG.II/WP.87, draft article 17
A/CN.9/412, draft article 12

Article 22. Competing rights of several assignees

(1) Where a receivable is assigned by the assignor to several assignees, (... priority is determined on the basis of time of [notification] [registration] of the assignment.

(2) [If no assignee registers the assignment, (...) priority is determined on the basis of the time of notification of the assignment.] If no assignee notifies the debtor, priority is determined on the basis of the time of assignment.

A/CN.9/WG.II/WP.87, draft article 18(1)

Remarks

1. Draft article 22 is predicated on the assumption that while all assignments of the same receivables by the same assignor are valid, the assignee with priority will receive payment. Whether that assignee may retain all the proceeds of the receivables or has to turn over any balance remaining to the next assignee in line of priority is left to other applicable law to be determined on the basis of the conflict-of-laws rules contained in the draft Convention.
2. An approach along the lines of draft article 22 would be inconsistent with the approach taken in legal systems in which the first assignment transfers title to the receivables and, as a result, the subsequent assignments are invalid. In those systems, the result may be the same, even if the assignment is by way of security, since the type of the assignment is a matter of contract between the assignor and the assignee.

3. Notification of the debtor might not be an efficient way of determining priorities in case of bulk assignments of future receivables, for a number of reasons, including that: the identity of the debtors would not be known; the cost and time involved in notifying a significant number of debtors would be substantial; and third parties would be faced with the task of having to enquire about the status of the receivables with all those debtors, who would be under no obligation to respond. On the other hand, while registration would resolve those problems, no suitable registry seems to exist for registration of assignments covered by the draft Convention and the legal issues arising in the context of registration remain to be addressed.

4. The Working Group might wish to consider whether the reference to "several assignees" is sufficient to cover a situation that involves an assignee and a creditor of the assignor with a security right in the assignor's goods which extends to the proceeds generated from the sale of the goods.

Article 23. Competing rights of the assignee and the assignor's creditors

The assignee has priority over creditors of the assignor attaching the assigned receivables (...), if:

(a) the receivables [were assigned] [arose] [became due] [were earned by performance] [and [notification] [registration] of the assignment occurred] before attachment; or

(b) the assignee has priority under the law governing attachment.

References: AlCN.9/432, 253 (twenty-fifth session, 1996)
A/CN 9/WG.II/WP.87, draft article 18(2)

Remarks

1. Under draft article 23, the rights of creditors of the assignor would be affected to the extent that the draft Convention provides that future receivables becoming due or being earned by performance after attachment are considered as transferred before attachment if they were assigned or the contract from which they might arise was concluded before attachment. Such an approach would mean that the assigned receivables would not be subject to attachment at all (in case of an assignment by way of sale) or would be subject to attachment to the extent of any surplus remaining after payment of the assignee (in case of an assignment by way of security).

2. In view of the fact that the draft Convention does not draw a distinction between assignments by way of sale and assignments by way of security (A/CN.9/420, para. 95 and A/CN.9/432, paras. 46, 163-164 and 257), the question whether the assignee obtaining payment has to turn over any surplus to the assignor's creditors is left to other applicable law to be determined on the basis of the conflict-of-laws rules contained in the draft Convention.

3. Subparagraph (a) requires two choices to be made: first, what fact has to occur before attachment for the assignee to have priority over the attachment creditors; and second, whether, in addition, some type of publicity of the assignment should take place before attachment for the assignee to obtain priority. The purpose of requiring some form of publicity would be to protect third parties by allowing them to take the assignment into account before extending credit to the assignor. Subparagraph (b) is intended to ensure that the draft Convention does not limit the rights of assignees that currently exist under national law.

4. The Working Group might wish to consider the question whether, in addition to (a) and (b), for the assignee to obtain priority in case of an assignment providing for future payments by the assignee, value must have been given in respect of the assignment before attachment or shortly thereafter (see United States Uniform Commercial Code art. 9-301(4)).

Article 24. Competing rights of the assignee and the insolvency administrator

The assignee has priority over the administrator in the insolvency of the assignor, if:

(a) the receivables [were assigned] [arose] [became due] [were earned by performance] [and [notification] [registration] of the assignment occurred] before the opening of the insolvency proceedings; or

(b) the assignee has priority under the law governing the insolvency of the assignor.

A/CN 9/WG.II/WP.87, draft article 18(3)

Remarks

1. Under draft article 24, the rights of the creditors in the insolvency of the assignor would be affected by a rule providing that the assignee has priority over the administrator in the insolvency of the assignor with regard to receivables that were assigned or arose from a contract concluded before, but became payable or were earned by performance after, the opening of the insolvency proceedings.

2. Depending on whether an assignment by way of sale or an assignment by way of security is involved, the receivables would not be part of the assignor's estate or would be part of the estate only to the extent of any balance remaining after the payment of the assignee.
3. Subparagraph (b) is intended to ensure that the present rights of the insolvency administrator under national law are not expanded.


Remarks

1. Paragraph (1) in its present formulation is intended to clarify that subsequent assignments that meet the criteria set forth in draft article 1 are governed by the draft Convention, even if the initial assignment falls outside the scope of application of the draft Convention (i.e. it is a domestic assignment of domestic receivables).

2. Paragraphs (2) and (3) might not be necessary since a subsequent assignment would be an “assignment” and a subsequent assignee would be treated as an “assignee” under the draft Convention.

3. Paragraph (4), which is intended to protect the debtor from having to determine the validity of all assignments in a chain of assignments, in order to obtain a valid discharge of its obligation might be usefully placed in draft article 16 dealing with the discharge of the debtor. Under the present formulation of paragraph (4), if in doubt as to the validity of an assignment the debtor may pay to a public deposit fund or seek the instructions of a competent judicial or non-judicial body.

4. The reference to the knowledge of the invalidity of the assignment on the part of the debtor has been inserted in paragraph (4) pursuant to a view expressed at the previous session of the Working Group that attracted some support (A/CN.9/432, para. 268). It appears within square brackets pending determination of the Working Group on paragraph (3)(a) of draft article 16.

2. Comments of the Permanent Bureau of the Hague Conference on Private International Law: note by the Secretariat

(A/CN.9/WG.II/WP.90) [Original: French]


2. Following the twenty-fifth session of the Working Group, the Secretariat received from the Permanent Bureau of the Hague Conference on Private International Law a set of comments relating to chapter V (conflict of laws) and to the scope of application of the draft convention (A/CN.9/WG.II/WP.87). The document in question is attached to the present note in the form in which it was received by the Secretariat.
discussions which will be focusing on chapter V of the draft rules and do not presume to anticipate the outcome of more advanced collaboration between UNCITRAL and the Hague Conference aimed at drafting, if need be, more elaborate and detailed conflict rules pertaining to assignment of receivables. But first and foremost, because of the considerable broadening of the scope of application of the uniform rules with respect to the types of assignment covered by the drafts (A/ACN.9/432, paras. 14-23)—a broadening which may have a direct effect in some cases on the content of the conflict rules—the comments given below must necessarily be confined, at the present stage of the work, to observations of a general nature. While it seems to have been accepted at the last meeting of the Working Group that the scope of application of the uniform rules—which until that point had pertained only to receivables arising from a contract—was being extended to cover non-contractual receivables (but whether all such receivables should be covered was not clear) and to certain assignments of a legal nature, no conclusion was reached regarding receivables arising from family law, the law of succession or any other source.

3. To be sure, if the instrument under preparation is intended to contain only conflict rules strictly limited to the aspect of assignment of receivables, along the lines of article 12 of the Convention on the Law Applicable to Contractual Obligations, adopted in Rome on 19 June 1980 (see paragraph 15, below), the broadening of the scope of application of the uniform rules should have scant effect on the conflict rules which might be adopted. However, if the Working Group were to consider it worthwhile—as the current drafts of articles 21 to 23 would appear to suggest—to adopt detailed conflict rules pertaining specifically to the choice of the law applicable to the legal relationship between the parties involved in an assignment of receivables, then the content of chapter V could not possibly be discussed before the precise scope of application of the uniform rules was established.

4. Before examining articles 21 to 23 in greater detail, the Permanent Bureau would like to make a few general remarks.

General remarks

5. In the draft rules, paragraphs 1 and 2 of article 21 and also article 22 itself begin with a phrase which the Permanent Bureau finds somewhat puzzling, namely "With the exception of matters which are settled in this Convention (.)". If we have correctly understood the purpose of this introductory phrase, it would appear that the only aim envisaged in adopting conflict rules is to establish the law which will apply to the gaps in the uniform rules, while the conflict rules rendering applicable either the uniform law itself or else the convention would be left to the national law of each State.

6. The Permanent Bureau of the Conference is, quite frankly, surprised at such a proposition, the motive for which it fails to understand. In the first place, this limitation would seem to be incompatible with article 1, paragraph 1(b) of the draft under discussion, a provision which specifically provides for the implementation of the uniform rules through the provisions of private international law. If it is intended at this early stage to introduce conflict-of-law rules into a set of rules pertaining to substantive law (an intention which the Permanent Bureau of the Conference finds regrettable), this should at least be done in a comprehensive manner and should not leave the main conflict rules, i.e. the rules which will implement the convention or the model law, out of the envisaged unification process.

7. Moreover, this phrase has a perverse effect in that it introduces into the uniform rules a type of semi-renvoi. By this, we mean that it obliges the court, whenever it notes a gap in the uniform rules, to apply the conflict-of-laws provisions of chapter V, provisions which may be different from those which it will have applied in order to implement the convention or the model law. In general terms, however, renvoi is widely rejected, as we know, in comparative law in all contractual spheres. And what is even more to the point, the unification of the conflict rules by conventional means must necessarily lead to the exclusion of renvoi: there would seem to be little point in attempting, in a particular area, to unify the conflict rules while at the same time allowing that the designated law—which in our case we would assume to be either the convention or the model law of UNCITRAL—incorporate the conflict rules of the law chosen, with the risk that those conflict rules might refer back to the law of a third State which has not adopted the unified substantive law.

8. For all these reasons, the Permanent Bureau suggests that this formulation of articles 21 and 22 be deleted and that, if a chapter on conflict of laws is retained in the draft, such a chapter should encompass all the relevant conflict rules.

9. Although the Permanent Bureau considers that, if conflict rules have to be adopted in the future convention or model law, they should remain as simple as possible and not go beyond the assignment of receivables (along the lines of the Rome Convention or article 145 of the Swiss Federal Act on Private International Law of 18 December 1987), it might be worthwhile at this point to give a brief overview of comparative law relating to the various problems raised by any assignment of receivables and to the distribution of such problems among the different laws applicable.1

10. Any assignment of receivables involves at least three parties, and this tripartite relationship is based on two separate and distinct legal relationships:

(a) The legal relationship between the assignor and the debtor, which may be of a contractual nature (as will normally be the case), but may also be non-contractual or may derive from, say, family law or the law of succession. It is this relationship which gives rise to the receivable to be assigned, and we submit that it is governed by what we shall henceforth refer to as the law governing the assigned receivable.

(b) The legal relationship between the assignor and the assignee, this being an almost exclusively contractual relationship in the course of which the receivable is transferred from the assignor to the assignee; the area of law applicable here is the law governing the assignment contract.

(c) There is no direct legal relationship between the assignor and the debtor. However, the action undertaken by the assignee of a contractual receivable vis-à-vis the debtor in respect of whom a receivable has been assigned is considered to be contractual in character, even where there is no contract directly linking the parties. In fact, such action is based on the contract linking the assigning creditor to the debtor.

1In order to prevent a proliferation of notes, the main (but not all) sources consulted by the Permanent Bureau in preparing these Comments are given below:

11. This being the case, there is good reason on the one hand to make clear distinctions according to the different categories of legal relationship between the parties and, on the other, to make a further distinction according to hypothetical cases of insolvency, questions of form, the obligation or otherwise to notify the debtor, and other such criteria.

12. It is generally allowed that the following are governed exclusively by the law governing the assigned receivable: in the first place, the assignability of the receivable or, in other words, whether the receivable arising from the legal relationship between the assignor and the debtor is capable of being assigned to a third party. The law governing the assigned receivables also governs all the relationships between the assignee and the debtor, in particular the conditions under which an assignment shall have effect vis-à-vis the debtor, the discharging effect of the payment of a debt by the debtor, the effectiveness of defences raised by the debtor in respect of a receivable assigned and the question, lastly, of priority among several competing assignments. This last connecting factor, which is unanimously allowed by doctrine and case law, is summarized succinctly in rule 123 of Dicey and Morris: "The priority of competing assignments of a debt [...] is governed by the proper law of the debt". It is also allowed that the question of whether or not the assignment is abstract or causal in nature is subject to the particular body of law governing the assignment, in other words the law governing the assigned receivable.

13. The law governing the assignment contract, however, prevails in respect of all issues pertaining exclusively to the relationship between a former and a new creditor, in particular the intrinsic validity of the assignment in relations between assignor and assignee, i.e. assignability, questions of culpa in contrahendo, fraud, and so forth. This law also governs the validity of the transfer of the receivable. Lastly, and this is a point which is expressly stated in article 145 of the Swiss Act, it is allowed that the form of the receivables assignment is governed by the law applicable to the agreement concluded between the assigning creditor and the assignee.

14. With regard to the law governing the formalities to be completed in notifying a debtor of an assignment, it is generally allowed, especially in France, that the relevant law in this case is not that pertaining to the assigned receivable, but that of the habitual residence of the debtor or his main place of business. The obligation or otherwise to notify the debtor of the assignment is seen as a publicity measure and, as such, subject to the law of the place where the measure is to be taken, namely the law of the habitual residence or main place of business of the debtor. This solution is challenged, however, in some countries where the requirement to notify the debtor of the assignment is regarded as a question pertaining to the substance rather than the form of the assignment. Moreover, the need for notification is not necessarily seen universally as a publicity measure. According to this particular doctrine or case law, which holds sway in Germany and Switzerland, the obligation to notify derives from the law governing the assigned receivable.

15. Lastly, in the case of insolvency on the part of either the assignor or the debtor, some of the connecting factors we have just noted are modified. It is accepted, for example, that the effectiveness of the assignment vis-à-vis the insolvency administrator should depend on the law governing the insolvency: according to Batiffol and Lagarde, this solution seems to be fair since the issue at stake is that of the effects of the insolvency due to its nature and not merely incidental to the assignment of receivables. Moreover, it is desirable that the insolvency regime be unified. For the same reasons, it would appear that the question of priority among several competing assignments should be evaluated by the administrator in the bankruptcy in conformity with the law applicable to such bankruptcy.

16. After this brief look at the different solutions offered by private international law, the Permanent Bureau would like to make the following comments on the drafting of articles 21 to 23 of the draft uniform rules.

**Article 21—Law applicable to the relationship between assignor and assignee**

17. An important preliminary remark should be made at this point. This article defines the law applicable to the legal relationship between assignor and assignee, a legal relationship in which the assignment of receivables is merely an accessory element. This legal relationship may take the form of different contracts (sale, guarantee, loan, financing etc.) for which conflict rules already exist in the different States, conflict rules which often have a conventional source. The Permanent Bureau takes the view that it should not be the function of a set of substantive rules which are confined to international assignments of receivables to incorporate a conflict rule relating to the determination of the law applicable to all the possible types of contract linking assignor and assignee. If it is intended to include conflict rules among the substantive rules envisaged by UNCITRAL, then such conflict rules should be strictly limited to questions concerning the actual assignment of receivables. The only conceivable formula, therefore, and the only one that does not undermine the various conflict systems already established in the contractual sphere, would have to be a solution similar to the one to be found in article 145 of the Swiss Act on Private International Law, in other words, a formula whereby the agreement between assignor and assignee is governed by the law applicable to the legal relationship on which the assignment is based.

18. With this qualification, therefore, the following comments may be made on paragraphs 1 to 4 of article 21:

This paragraph renders the transfer of a receivable between the assignor and the assignee subject to the law applicable to the receivable being assigned. The Permanent Bureau believes this connecting factor to be mistaken and to be in conflict with all the systems of private international law of relevance (see paragraphs 11 and 12, above). The authors of this paragraph appear to have confused the transfer of a receivable with its assignability. As we saw above under General remarks, the assignability of a receivable is subject to the law governing the assigned receivable, whereas the transfer of the receivable is subject solely to the law governing the assignment contract. This is what emerges from article 12, paragraph 1, of the Rome Convention, in connection with which provision it is interesting to recall some comments made by the rapporteurs of the Convention. Giuliano and Lagarde wondered why the authors of the Rome Convention had used the formula "the mutual obligations of assignor and assignee [...] shall be governed by the law [...]", instead of saying more simply that the transfer of a receivable by agreement should be governed in the relationship between assignor and assignee by the law applicable to their agreement. This formula had been adopted originally, but was abandoned owing to a problem of interpretation to which it might have given rise in German law, where the term "transfer" of a receivable encompasses the effects of the assignment vis-à-vis the debtor, a possibility which was expressly ruled out, however, by article 12, paragraph 2. The authors of the Report take pains to stress that it was precisely to avoid a formulation which might suggest that the law applicable to the assignment agreement, in a system of law where it is viewed as Kausalgewacht, also determines the conditions for validity of the assignment
with respect to the debtor that the present wording was finally adopted. The Permanent Bureau believes that, for the same reasons, the UNCITRAL draft should avoid any reference to "transfer of receivables".  

19. Regarding the acknowledgement of freedom of choice in this connection, and subject to the comments made above (see paragraph 15), the Permanent Bureau has no objection to article 21, paragraph 2, except for the clause "including, but not limited to, the validity of the assignment (...)", a phrase whose meaning it finds somewhat obscure. If the intrinsic validity of the assignment does indeed derive from the law governing the assignment contract, other problems will also be subject to that law and isolating the validity issue could lead to confusion.  

20. As regards paragraphs 3 and 4, the reference to the law of the country with which the assignment is most closely connected (a phrase which the commentary quite correctly points out as having been drawn from the Rome Convention) would not appear to be an adequate connecting factor: since assignment is an accessory element of the contract agreed between the assignor and the assignee, it is not the law of the country with which the assignment is most closely connected but rather the law of the country with which the assignment contract is most closely connected that should be chosen. If, for example, the assignment contract is a sale contract, then the law of the country with which this sale is most closely connected should be chosen. This, moreover, is the solution adopted by the Rome Convention in its article 12.  

21. As for the other connecting factor adopted—the law of the State in which the assignor has its place of business—this is ruled out for the reasons stated above (see paragraph 15, above).  

Article 22—Law applicable to the relationship between assignee and debtor  

22. The Permanent Bureau would suggest retaining the words contained within the first set of square brackets, i.e. retaining the law governing the receivable to which the assignment relates, a connecting factor which has the support of doctrine and case law in almost all the different States. The law of the State where the debtor has its place of business seems particularly ill-suited to governing the relationship between assignee and debtor, especially where account is to be taken of the defences which the debtor might exercise against the assignee, defences which can only arise under the basic contract forming the basis of the assignment.  

23. As in the case of article 21, the Permanent Bureau has serious misgivings about the clause in article 22 beginning with the phrase "including, [...]". The circumstances listed in this clause are not exhaustive, and the reference to "the right of the assignee to notify the debtor" would appear to derive from a different law from that governing the receivable (see paragraph 13, above). Moreover, what is relevant here is not the right of the assignee so much as the legal obligation on the part of the assignee to notify the debtor.  

Article 23—Law applicable to priority  

24. In the light of the comments made above under General remarks, this article warrants careful consideration with regard to two points: firstly, the connecting factor to be selected and, second, the case of bankruptcy. We have seen that the question of priority among different assignees is generally governed by the law applicable to the receivable assigned. It is a question, in fact, of the unity of the regime governing the receivable assigned: given that the law applicable to the receivable assigned governs the two important points of the assignability of that receivable on the one hand and, on the other, the defences that the debtor might exercise against the assignee, it would appear logical for the question of priority to be subject to the same law. For Dicey and Morris this is indeed the only law that comes into consideration (rule 123) (see paragraph 11, above).  

25. As for the case of bankruptcy, this implies a solution which is virtually mandatory: the administrator in the bankruptcy must apply the same law—namely that applicable to the bankruptcy—to all questions of priority, whether among different creditors in respect of the same receivable or among the insolvent person’s creditors bearing claims to different receivables. Here it is not merely a question of the unity of the bankruptcy and the need to apply the same regime to all the creditors, but it is also a matter, in some countries, of ordre public.  

Relationship between conflicts of law and the scope of application of the substantive rules  

26. At the last meeting of the Working Group in July 1996, during the discussion on the scope of application of the future uniform rules, a question was raised as to the application of those rules to parties located in States which had not adopted them. In the face of the complexity of this problem, an ad hoc Working Group was set up, which submitted the results of its discussions in a Memorandum dated 9 July 1996. This Memorandum has not yet been formally discussed by the Working Group, but will be examined at future meetings.  

27. This Memorandum identifies seven hypothetical cases which might give rise to problems and regarding which the ad hoc group puts a number of questions. We propose here to look at one of these cases envisaged, the line of argument developed being valid for the other six.  

28. The first case is that of the insolvency of the assignor. The first question posed is whether or not the rules of the convention should apply in determining the relative rights of the administrator in the bankruptcy and the assignee in relation to the assigned receivables. The second question asked is whether or not the reply to the first question depends on the fact that the debtor’s domicile is located in a contracting State. The Permanent Bureau takes the view that these two questions are not of the same order and cannot have any influence on one another.  

29. It is one thing to determine the content of the substantive rules and quite another to know when the rules will apply in specific cases. There seems to be no good reason why the reply to the first question should depend on whether or not the debtor is resident in a contracting State. Given the considerable intellectual effort and substantial financial resources involved in the elaboration by UNCITRAL of unified substantive rules relating to the assignment of receivables, it is probably desirable that this process of unification should encompass most, if not all, of the problems raised by such assignment. In particular the insolvency of the creditor or debtor, the question of priority among assignees, the issue of subsequent assignments, and so forth.  

30. However, the issue of whether these substantive rules will—in a given case, apply to one of the questions raised by assignment of a receivable is a different matter altogether. Whether the substantive rules take the form of a uniform law or a convention (it has been decided to opt for a convention, it being understood that when the Working Group has completed its work this decision could be reviewed), the unified rules formulated by UNCITRAL will govern the different relationships involved in an assignment of receivables only if, through the application of the conflict rules by the court hearing the particular case, the law declared applicable is that of a State which has either adopted the uniform law or ratified the convention.
To come back to the bankruptcy example, the administrator in a bankruptcy will only apply the unified rules if the law applicable to the bankruptcy is that of a State Party to the convention or one which has adopted the uniform law.

31. It therefore seems pointless to contemplate a provision whereby the convention would be applicable by virtue of the fact that the assigning creditor is resident in a contracting State. Such a rule would be inoperative in the case where the debtor was resident in a non-contracting State and where an assignment relationship was governed by the law of the place of residence of the debtor, or where the law applicable to the assigned receivable was not that of a contracting State with regard to all the issues raised by that law. This is one of the major difficulties inherent in adopting the substantive rules in the form of a convention. The Permanent Bureau would like to take the liberty of suggesting that the UNCITRAL Working Group reconsider its decision: if the substantive rules were to be formulated as a uniform law, the situation would be clear: this law, covering the entire range of questions raised by assignment of international receivables, would be applied wherever the conflict rule specified it as being applicable, but only in those specific cases.

32. At the same time, visualizing the scope of application of a convention embracing all the hypothetical cases covered by the Memorandum raises some knotty problems. Another solution possibly worth discussing might be that of a convention whose provisions would be applicable only if the parties so wished. Along the lines of the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988), the implementation of the new convention would depend on the will of the parties, since the convention would contain an opting-in clause as a precondition for its applicability. This solution would gain even greater appeal if the future convention were to provide for a centralized system for registering assignments of international receivables. The Permanent Bureau considers that this question of the scope of application of any future convention should be the subject of further consideration.

3. Comments by the Observer of the Commercial Finance Association:

note by the Secretariat
(A/CN.9/WG.II/WP.91) [Original: English]

1. At the twenty-fourth session of the Working Group on International Contract Practices, reference was made to the relevance and utility of information, in particular relating to the experience and needs of practitioners and other interested circles, that might be brought to the attention of the Working Group (A/CN.9/420, para. 203).

2. Following the twenty-fifth session, the Secretariat received from the Commercial Finance Association, an international trade and finance association with over 260 member organizations active in the field of receivables financing, a note discussing certain issues addressed in document A/CN.9/WG.II/WP.89. The text of the note is reproduced in the annex to this note as it was received by the Secretariat.

ANNEX

Introduction

The Commercial Finance Association (CFA) has followed with interest the work being conducted by the Working Group on International Contract Practices of the United Nations Commission on International Trade Law (UNCITRAL) regarding the drafting of uniform rules for the assignment of receivables. CFA firmly believes that, unless a framework is adopted which provides certainty and ease in securing rights in international receivables, the primary objectives of providing access to new and increased sources of credit in international markets will not be achieved. It is with the goal of providing to the Working Group the experience of CFA members that the following comments and suggestions are provided to aid in the establishment of a system which will greatly enhance the availability of credit and reduce the cost of obtaining that credit:

(1) CFA position—article 1:

The Rules to be adopted should take the form of a Convention rather than a Model Law. A Convention will enable the lender to avoid the cost and time necessary in reviewing State law variations which would result from implementation of a Model Law. The additional costs associated with a State-by-State review of State law, which would be required by implementation of a Model Law, would be passed on to the assignor and could considerably reduce the number of States where receivables would be acceptable to the lender as collateral.

(2) CFA position—articles 1 and 2:

The scope of coverage of the Convention should be drafted as broadly as possible. It should not be drafted in a way which creates ambiguity as to the application of the Convention. Lenders will not be willing to advance against any international receivable if there is a possibility that the international receivable upon which the lender is relying on to support its loan would not be covered by the Convention. Drafting the scope of the Convention broadly increases the receivables which can be considered as collateral by the lender increasing the amount of money the lender will be able to advance to the assignor. Therefore, CFA supports a Convention which would apply both to the domestic assignments of international receivables and to international assignments of domestic receivables and a Convention which will cover "consumer" as well as "commercial" receivables. This will not only lead to greater availability of credit but will enhance the ease of administration of a lending programme because the assignor will not have to maintain separate records of "consumer" and "commercial" receivables which would be necessary if the Convention were limited to only "commercial" receivables.

(3) CFA position—article 3:

CFA supports a Convention which would provide a definition of "writing" that encompasses data messages capable of being reproduced in tangible or similar form. A Convention which will allow for electronic communication will increase efficiency, accuracy and give greater flexibility to the registration process.

(4) CFA position—article 9:

The Convention must apply to bulk assignments and to assignments of single receivables and must in all instances apply...
to existing and future receivables. In order to expedite the lending process and reduce costs to the lender which will be passed on to the assignor, a framework must be created which will reduce the documentation needed to support an accounts receivable loan. If the Convention does not adopt the language currently set forth in article 9 and if new documents are required to be executed by the assignor each time a new receivable covered by the Convention comes into existence, costs of administering a lending programme will increase dramatically and the time needed to obtain properly executed assignment documents and to review the documents will slow the lending process to the detriment of the assignor.

(5) **CFA position—article 10:**

The Convention should invalidate any clause in agreements between the assignor and the debtor prohibiting or restricting assignments of receivables. CFA strongly believes that such an approach is required to prevent the extraordinary costs and time delays which would result if lenders were required to review each agreement which supported a receivable to make certain that the agreement between the assignor and the debtor did not contain anti-assignment provisions which would make the account unacceptable as collateral.

(6) **CFA position—articles 21-24:**

The Convention must provide a framework which will enable the lender to know with certainty its priority in respect to other assignees in the receivables assigned. It is for this reason that CFA strongly supports an article which will provide that where a receivable is assigned by the assignor to several assignees, the first assignee to register the assignment will have priority. This form of rule to determine priorities is far superior to a rule which would set priorities based either on the first to obtain an assignment of the receivable or the first assignee to notify the debtor. A rule which would set priorities based on the first to obtain assignment will not enable the lender to know with certainty its position with respect to the receivable and a rule which sets priority based on the first assignee to notify the debtor places a burden on the lender to notify debtors. This can require considerable time and money and delay the extension of credit to the assignor, causing a negative impact on and increasing costs to the debtor. If a lender cannot be certain of its priority rights to the receivables, it will not advance funds against the receivable.

CFA recognizes that many countries may face practical problems implementing the registration of assignments of receivables. This will especially be true if electronic registers, which are the most efficient means of recording security interests, are to be established. Careful attention will have to be given to these problems. CFA would be pleased to cooperate with and support the efforts of UNCITRAL as the commission addresses the issue of electronic registration.

**Conclusion**

It is the firm belief of CFA that a Convention on assignment of receivables with an international element is needed to increase the availability of credit. It is the hope of CFA that the above positions will be implemented in order to provide the commercial certainty and simplicity of operations required to meet the goals of UNCITRAL.
III. ELECTRONIC COMMERCE


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IV. FUTURE WORK

INTRODUCTION

1. Upon adoption of the UNCITRAL Model Law on Electronic Commerce (hereinafter referred to as “the Model Law”), the Commission, at its twenty-ninth session (1996), proceeded with a discussion of future work in the field of electronic commerce, based on a preliminary debate held by the Working Group on Electronic Data Interchange at its thirtieth session (A/CN.9/421, paras. 109-119). It was generally agreed that UNCITRAL should continue its work on the preparation of legal standards that could bring predictability to electronic commerce, thereby enhancing trade in all regions.

2. New proposals were made as to possible topics and priorities for future work. One proposal was that the Commission should start preparing rules on digital signatures. It was stated that the establishment of digital signature laws, together with laws recognizing the actions of “certifying authorities” (hereinafter referred to as “certification authorities”), or other persons authorized to issue electronic certificates or other forms of assurances as to the origin and attribution of messages "signed" digitally, was regarded in many countries as essential for the development of electronic commerce. It was pointed out that the ability to rely on digital signatures would be a key to the growth of contracting as well as the transferability of rights to goods or other interests through electronic media. In a number of jurisdictions, new laws governing digital signatures were currently being prepared. It was reported that such law development was already non-uniform. Should the Commission decide to undertake work in that area, it would...
have an opportunity to harmonize the new laws, or at least to establish common principles in the field of electronic signatures, and thus to provide an international infrastructure for such commercial activity.

3. Considerable support was expressed in favour of the proposal. It was generally felt, however, that the Commission decide to undertake work in the field of digital signatures through its Working Group on Electronic Data Interchange, it should give the Working Group a precise mandate. It was also felt that, since it was impossible for UNCITRAL to embark on the preparation of technical standards, care should be taken that it would not become involved in the technical issues of digital signatures. It was recalled that the Working Group, at its thirtieth session, had recognized that work with respect to certification authorities might be needed, and that such work would probably need to be carried out in the context of registries and service providers. However, the Working Group had also felt that it should not embark on any technical consideration regarding the appropriateness of using any given standard (A/CN.9/421, para. 111). A concern was expressed that work on digital signatures might go beyond the sphere of trade law and also involve general issues of civil or administrative law. It was stated in response that the same was true of the provisions of the Model Law and that the Commission should not shy away from preparing useful rules for the reason that such rules might also be useful beyond the sphere of commercial relationships.

4. Another proposal, based on the preliminary debate held by the Working Group, was that future work should focus on service providers. The following were mentioned as possible issues to be considered with respect to service providers: the minimum standards for performance in the absence of party agreement; the scope of assumption of risk by the end parties; the effect of such rules or agreements on third parties; allocation of the risks of interloper's or other unauthorized actions; and the extent of mandatory warranties, if any, or other obligations when providing value-added services (A/CN.9/421, para. 116).

5. It was widely felt that it would be appropriate for UNCITRAL to examine the relationship between service providers, users and third parties. It was said that it would be very important to direct such an effort towards the development of international norms and standards for commercial conduct in the field, with the intent of supporting trade through electronic media, and not have as a goal the establishment of a regulatory regime for service providers, or other rules which could create costs unacceptable for market applications of electronic data interchange (EDI) (A/CN.9/421, para. 117). It was also felt, however, that the subject matter of service providers might be too broad and cover too many different factual situations to be treated as a single work item. It was generally agreed that issues pertaining to service providers could appropriately be dealt with in the context of each new area of work addressed by the Working Group.

6. Yet another proposal was that the Commission should begin work on the preparation of the new general rules that were needed to clarify how traditional contract functions could be performed through electronic commerce. Uncertainties were said to abound as to what "performance", "delivery" and other terms meant in the context of electronic commerce, where offers and acceptances and product delivery could take place on open computer networks across the world. The rapid growth of computer-based commerce as well as transactions over the Internet and other systems had made that a priority topic. It was suggested that a study by the Secretariat could clarify the scope of such work. Should the Commission, after examination of the study, decide to pursue this task, one option would be to place such rules in the "Special provisions" section of the Model Law.

7. A further proposal was that the Commission should focus its attention on the issue of incorporation by reference. It was recalled that the Working Group had agreed that that topic would appropriately be dealt with in the context of more general work on the issues of registries and service providers (A/CN.9/421, para. 114). The Commission was generally agreed that the issue could be dealt with in the context of work on certification authorities.

8. After discussion, the Commission agreed that placing the issue of digital signatures and certification authorities on the agenda of the Commission was appropriate, provided that it was used as an opportunity to deal with the other topics suggested by the Working Group for future work. It was also agreed as to a more precise mandate for the Working Group that the uniform rules to be prepared should deal with such issues as: the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use of certification techniques; the specific issues of certification through the use of registries; and incorporation by reference.

9. The Commission requested the Secretariat to prepare a background study of the issues of digital signatures and service providers, based on an analysis of laws currently being prepared in various countries. On the basis of that study, the Working Group should examine the desirability and feasibility of preparing uniform rules on the above-mentioned topics. It was agreed that work to be carried out by the Working Group at its thirty-first session could involve the preparation of draft rules on certain aspects of the above-mentioned topics. The Working Group was requested to provide the Commission with sufficient elements for an informed decision to be made as to the scope of the uniform rules to be prepared. In view of the broad scope of activities covered by the Model Law and by possible future work in the area of electronic commerce, it was decided that the Working Group on Electronic Data Interchange would be renamed "Working Group on Electronic Commerce".

10. The Working Group on Electronic Commerce, which was composed of all the States members of the Commission, held its thirty-first session in New York from 18 to 28 February 1997. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Bulgaria, China, Egypt, Finland, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, and other States members of the Commission.
Part Two: Studies and Reports on Specific Subjects

Poland, Russian Federation, Singapore, Slovakia, Spain, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

11. The session was attended by observers from the following States: Canada, Colombia, Czech Republic, Denmark, Gabon, Indonesia, Ireland, Kuwait, Mauritania, Mongolia, Republic of Korea, Sweden, Switzerland and Turkey.

12. The session was attended by observers from the following international organizations: United Nations Conference on Trade and Development (UNCTAD), European Commission, International Bar Association (IBA), International Chamber of Commerce (ICC) and International Association of Lawyers.

13. The Working Group elected the following officers:
   
   Chairman: Mr. Mads Bryde ANDERSEN (Denmark);
   Vice-Chairman: Mr. PANG Khang Chau (Singapore);
   Rapporteur: Mr. Piotr AUSTEN (Poland).

14. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.70), and a note by the Secretariat (A/CN.9/WG.IV/WP.71).

15. The Working Group adopted the following agenda:
   1. Election of officers.
   2. Adoption of the agenda.
   4. Other business.
   5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

16. The Working Group discussed the issues of digital signatures, certification authorities and related legal issues on the basis of the note prepared by the Secretariat (A/CN.9/WG.IV/WP.71). The deliberations and conclusions of the Working Group with respect to those issues are reflected in section II below. The Working Group also held preliminary discussions of the issues of incorporation by reference and future work. Those discussion are reflected in sections III and IV below.

II. LEGAL ISSUES AND POSSIBLE PROVISIONS TO BE CONSIDERED IN UNIFORM RULES ON DIGITAL SIGNATURES

A. General Remarks

17. Before discussing possible provisions to be considered in uniform rules on digital signatures and related legal issues, the Working Group exchanged views on the scope of its work and considered initiatives currently being undertaken at the national level to address legal issues concerning digital signatures and certification authorities.

18. The Working Group heard reports on the efforts currently being made at the national level to address legal issues concerning digital signatures. A number of countries were considering the question of the appropriate legal regime for devices capable of performing in an electronic environment, functions analogous to those of a handwritten signature in a paper-based environment. While in some countries the consideration of that question was still at its preliminary stages, it was reported that some countries had already enacted laws on digital signatures, or were in the process of preparing legislation on that subject against the background of the Model Law. Such legislation often contemplated the use of digital signatures based on public-key cryptography and certification authorities. The scope and level of detail of such legislation ranged from general laws adopted to enable the use of digital signatures as a method for authenticating electronic messages, to more detailed legislation that established a legal framework for the functioning of certification authorities and might also deal with a number of issues involving considerations of public policy, such as: the creation of the administrative framework required by a public-key infrastructure (PKI); the use of cryptography for digital signatures or for confidentiality purposes; issues of consumer protection; and the possibility that government authorities would retain access to encrypted information, for example through a mechanism of "key escrow". The Working Group also heard reports on efforts towards harmonization that were currently undertaken at a regional level in a number of international organizations.

19. The question of the legal regime of devices used for performing functions equivalent to handwritten signatures, such as digital and other forms of electronic signatures, was found to be one of the most important issues that needed to be addressed so as to strengthen the legal infrastructure for electronic commerce. There was general agreement that the absence of a legal regime for digital and other electronic signatures might pose an impediment to economic transactions affected through electronic means. It was also agreed that the diversity of approaches and possible solutions being considered at the national level made that topic suitable for harmonization efforts on the part of UNCITRAL. In addition to providing guidance as to the legal framework to be established by enacting States with respect to digital and other forms of electronic signatures, it was felt that it would be useful for UNCITRAL to focus its work on the question of criteria for recognition of certificates issued by foreign certification authorities. It was suggested that UNCITRAL might also be in a position to facilitate that process by establishing internationally acceptable minimum standards for licensing certification authorities.

20. The Working Group considered the question whether its work should focus only on "digital signatures" (i.e. techniques involving the use of "public-key cryptography", also referred to as "dual-key cryptogra-
ment in the Working Group that it should not extend
to issues relevant to other electronic
signature techniques could also be considered.

It was generally understood that, where appropriate in the discussion, a more general approach
be developed by the Working Group should not discour­
ance with article 7 of the Model Law. However, with a view to fulfilling functions typically performed by handwritten signatures. Those technologies included the use of codes or “passwords”, or biometrical identification devices, and might coexist with a system of digital signatures based on a public-key infrastructure. It was noted that, in a paper-based environment, authentication and certification formalities and requirements were not needed in a number of transactions. While digital signatures within a public key infrastructure were said to af­

21. It was widely felt that the aim of uniform rules on electronic signatures should be to provide guidance to legislators as to how a wide variety of authentication-related functions could be performed in an electronic environment. Such functions ranged along what was referred to as a “sliding scale” from providing the highest degree of security (along the lines of “notarized” and other certified signatures in a paper-based environment) to the low level of security offered by handwritten marks or signature stamps. However, one of the difficulties of undertaking work in the area of electronic signatures stemmed from the fact that, if the uniform rules to be prepared were to provide the level of guidance that might be required to implement the principles embodied in article 7 of the Model Law, they might have to deviate from a purely functional approach, and to address in some detail the manner in which specific techniques could perform the above-mentioned functions.

22. There was general agreement that, consistent with media neutrality in the Model Law, the uniform rules to be developed by the Working Group should not discour­

Be considered.

24. Various views were expressed as to whether the Working Group should also address consumer law issues. According to one view, consumer issues should be ex­
cluded from the scope of the current work, which should instead focus exclusively on commercial transactions. Another view was that, while the main issues to be con­sidered were not intrinsically consumer-related, it might be appropriate to consider, in the preparation of uniform rules on digital signatures, whether different standards were needed for consumer transactions. It was suggested, however, that making specific provisions for consumer law issues might prove particularly difficult because the nature of electronic communications made it almost impossible to identify any party as a consumer. After discus­sion, it was agreed that, while focusing primarily on commercial transactions, the Working Group would take note of possible implications of the matters it discussed with respect to consumer transactions.

B. Specific legal issues and draft provisions on
digital signatures

25. As to the form of the work to be undertaken by the Working Group, various views were expressed. One view was that it would be premature to consider that the work to be prepared by the Working Group on the issues of digital signatures and related issues should take the form of model legislation. Another view was that, as a working assumption, the Working Group should decide that its future work on the issues of digital signatures and related issues should be regarded as an addition to the Model Law. It was recalled that, at its twenty-ninth session, the Commission had requested the Working Group to examine the desirability and feasibility of preparing uniform rules on the issues of digital signatures and cer­

26. After discussion, the Working Group postponed its decision as to the form of its future work until it had completed its review of the substantive legal issues in­
volved. The Working Group also postponed its considera­tion of the precise relationship between such future work and the Model Law. It was agreed that possible uniform rules in the area of digital signatures should be derived
from article 7 of the Model Law and should be considered as setting out a manner in which a reliable method could be used "to identify a person" and "to indicate that person's approval" of the information contained in a data message. More generally, future work on digital signatures should be consistent with the principles expressed, and the terminology used, in the Model Law.

27. To assist in its discussions in the future, the Working Group adopted as a tentative working assumption that its work in the area of digital signatures would take the form of draft statutory provisions. The view was expressed, however, that the Working Group might consider the need to provide additional explanations, possibly by way of a preamble, by way of a guide to enactment of the uniform statutory provisions, or through the elaboration of separate guidelines, in particular with respect to issues that might be regarded as unsuitable for unification. For example, it was stated that illustrative comments emanating from UNCITRAL regarding the various issues raised by the establishment of public-key infrastructure might play a useful educational purpose.

28. It was decided that the Working Group would proceed with its deliberations on the basis of the draft uniform provisions set forth in the note by the Secretariat (A/CN.9/WG.11/VI/WP.71, paras. 52-76). It was noted that those draft provisions were very tentative in nature, and it was generally agreed that the review of those draft provisions, rather than focusing on the drafting of each individual article, should be regarded as an opportunity to discuss the conceptual approach on which uniform rules on digital signatures could be based. It was generally felt that, in the context of its discussion of each of the issues addressed by the draft provisions, the Working Group might need to consider: (a) whether uniformity was needed; (b) whether the issue was sufficiently treated in the Model Law or whether more detailed provisions were desirable; (c) whether the issue was specific to digital signatures or whether it could be dealt with at a more general level; (d) whether the issue was directly relevant to international trade law, to the mandate of UNCITRAL and to its field of expertise; and (e) whether a mandatory rule was needed or whether party autonomy should prevail.

1. Definitions

29. At the outset, the view was expressed that, in addition to the draft definitions of "digital signature", "authorized certification authorities" and "certificates" set forth in the note by the Secretariat (A/CN.9/WG.11/VI/WP.71, paras. 52-60), the Working Group might need to consider additional definitions. The following definitions were suggested: "private key" means the key of a key pair used to create a digital signature"; "public key" means the key of a key pair used to verify a digital signature"; "key pair", in an asymmetric cryptosystem, means a private key and its mathematically-related public key, having the property that the public key can verify a digital signature that the private key creates". The Working Group took note of the suggestion. The view was expressed that the suggested definitions might be somewhat circular. More generally, a note of caution was struck about introducing a large number of definitions in uniform rules of a statutory nature, which might be contrary to the legislative tradition in many countries. After discussion, it was generally agreed that the possibility of adding a limited number of definitions might need to be reconsidered at a later stage.

(a) Digital signature

30. The Working Group discussed the definition of "digital signature" on the basis of the following draft provision:

"Draft article A

(1) A digital signature is a numerical value, which is affixed to a data message and which, using a known mathematical procedure associated with the originator's private cryptographic key, makes it possible to determine uniquely that this numerical value has been obtained with the originator's private cryptographic key.

(2) The mathematical procedures used for generating authorized digital signatures under [this Law] are based on public-key encryption. When applied to a data message, those mathematical procedures operate a transformation of the message such that a person having the initial message and the originator's public cryptographic key can accurately determine

"(a) whether the transformation was operated using the private cryptographic key that corresponds to the originator's public cryptographic key; and

"(b) whether the initial message was altered after the transformation was made.

(3) A digital signature affixed to a data message is regarded as authorized if it can be verified in accordance with procedures laid down by a certification authority authorized under [this Law] .

(4) The [relevant authority in the enacting State] shall lay down specific rules for the technical requirements to be met by digital signatures and the verification thereof."

Paragraphs (1) and (2)

31. The view was expressed that the definition of "digital signature" should be extended to cover not only the use of public-key cryptography but also other types of electronic signatures. The prevailing view, however, was that it would be inappropriate to attempt creating a definition of "digital signature" that would depart from existing usages. It was agreed that, while the notion of "digital signature" should be restricted in scope to cover only asymmetric cryptography, other definitions might be needed to cover other techniques that might be broadly referred to under the notion of "electronic signatures".

32. With respect to paragraph (1), it was suggested that the words "to determine uniquely that this numerical value has been obtained" should be replaced by the words "to determine that this numerical value has only been obtained". The Working Group decided that, at such an early stage of its deliberations, it should not engage in
any detailed redrafting of the text. It was generally felt that paragraphs (1) and (2) reflected in substance the notion of "digital signature" as it might be used to delimit the scope of future work. After discussion, the Working Group found the substance of paragraphs (1) and (2) to be generally acceptable, but agreed that it might need to reconsider their specific drafting at a later stage.

**Paragraph (3)**

33. Various questions were raised concerning the purpose of paragraph (3). The view was expressed that paragraph (3) was inadequate for the purpose of introducing the notions of public-key infrastructure and verification of digital signatures and that paragraph (3) dealt instead with substantive matters that did not belong in the definition of "digital signature". The view was expressed that paragraph (3) might be read as introducing a verification procedure as a requirement for the validity of a digital signature. It was suggested that it would be preferable to delete paragraph (3) and replace it with a descriptive definition of "verification" of signatures.

34. It was pointed out that paragraph (3) might be read as dealing only with the validity of digital signatures that were used in the context of a public-key infrastructure implemented by public authorities. As currently drafted, that provision was felt to be excessively rigid, as it might preclude the recognition of the use of digital signatures in any other context, such as public-key infrastructures implemented by entities other than public authorities. It was generally felt that it would be undesirable to affect transactions that might take place in closed circles between parties that did not feel the need for obtaining the services of a certification authority. At a time when various options for public-key infrastructure were still under consideration by States, it was stated that it would be premature to make a choice in the draft uniform rules in favour of any particular system of public-key infrastructure to the detriment of all others.

35. The view was expressed that, while paragraph (3) had to be read in conjunction with article 7 of the Model Law, the two provisions might not be entirely consistent with one another. For instance, paragraph (3) qualified the notion of "digital signature" by referring to "authorized" digital signature, a word that was not used in the context of article 7 of the Model Law or elsewhere in draft articles A to J as set forth in the note by the Secretariat (A/CN.9/WG.1IV/WP. 71). Moreover, article 7 of the Model Law referred to the use of a signature method "as reliable as was appropriate for the purposes for which the data message was generated or communicated", thus admitting varying levels of reliability according to the purposes for which the data message was generated or communicated, including any agreement of the parties. It was pointed out that, under article 7 of the Model Law, the parties to a transaction having sufficient confidence in one another could agree to a level of security they found appropriate in the circumstances, without necessarily resorting to a certification authority. From the parties' perspective, the essential consideration was whether they regarded the system they operated as trustworthy. A number of factors were said to make up for the trustworthiness of the hardware, software and procedures used by the parties (e.g. whether they were reasonably secure from intrusion and misuse; whether they provided a reasonable level of availability, reliability and correct operation; whether they were reasonably suited to performing their intended function; and whether they were operated in conformity with generally accepted security principles). Therefore, it was for the parties to decide whether the standard of reliability they required should include a verification procedure applied by a certification authority. Paragraph (3), in turn, implied that digital signatures would only be reliable if they were capable of being certified with the assistance of a certification authority. It was therefore found to be more restrictive than article 7 of the Model Law. It was stated that substantive revision would be required if paragraph (3) was to be brought into harmony with article 7 of the Model Law.

36. Questions were also raised concerning the reference, in paragraph (3), to verification of the digital signature in accordance with procedures laid down by the certification authority. The view was expressed that a reference to those procedures raised the issue of the technical instructions applied for verification of digital signatures and other operation criteria observed by the certification authority, or the legal effects that would flow from those procedures not being followed in a given case. However, those were substantive questions which could not properly be dealt with within the limited scope of draft article A. Therefore, it was suggested that the reference to verification procedures should be deleted from paragraph (3).

37. Having considered the different views expressed, the Working Group decided to delete paragraph (3). It was agreed that the discussion of possible options of public-key infrastructure might need to be reopened after the question of the legal effects of digital signatures had been examined.

**Paragraph (4)**

38. The view was expressed that, to the extent it required the State to lay down technical rules for digital signatures, paragraph (4) appeared to exclude public-key infrastructures implemented by entities other than public authorities. Consistent with its decision to delete paragraph (3), and given the logical relation between the two provisions, the Working Group decided that paragraph (4), too, should be deleted.

(b) Authorized certification authorities

39. The Working Group discussed the definition of "authorized certification authority" on the basis of the following draft provision:

"Draft article B"

"(1) The ... [the enacting State specifies the organ or authority competent for authorizing certification authorities] may grant authorization to certification authorities to act in pursuance of [this Law] [these Rules]. Such authorization may be revoked.

"(2) The ... [the enacting State specifies the organ or authority competent to promulgate regulations with respect to authorized certification authorities] may es-
40. The Working Group held a general exchange of views on the approach that should be taken for dealing with certification authorities. Pursuant to one view, draft article B, as currently formulated, appeared to prescribe a specific method for implementing a public-key infrastructure and it would be preferable to leave it for each enacting State to adopt its own rules on that matter. It was stated that, while certification authorities might play an essential role in building trust in the reliability of digital signatures, digital signature systems functioning in the absence of certification authorities were not inconceivable. It was also stated that the establishment of a public law scheme under which certification authorities might be authorized to operate would not necessarily foster the trustworthiness of digital signatures, which might be better achieved through privately-appointed certification authorities, or other forms of market-driven mechanisms. Another view was that draft article B was generally acceptable for the purpose of defining certification authorities, since it was formulated in a permissive way, in particular through paragraph (2), which did not prevent the enacting State from implementing its public-key infrastructure in a different fashion.

41. For the purpose of considering possible approaches that should be taken for dealing with certification authorities, the Working Group was invited to consider two possible objectives that might be pursued through a definition of "certification authority". One objective might be to provide guidance to enacting States concerning essential elements to be considered when implementing national public-key infrastructures. It was stated that draft article B was not sufficiently detailed to provide adequate guidance in that regard. An alternative objective might be to leave the internal implementation of public-key infrastructures to each enacting State, while setting forth in the definition of "certification authority" the criteria to be applied by each enacting State for the recognition of certificates issued by foreign certification authorities. It was suggested that, should the Working Group wish to circumscribe the scope of the draft uniform rules to the latter purpose, an opening paragraph might need to be inserted in draft article B along the following lines: "These uniform provisions apply to certificates issued pursuant to a legal regime having the following attributes." It was noted, however, that, if adopted, such a proposal would require substantive revision of the remaining provisions of draft article B. Another suggestion was that no specific criteria should be set forth under draft article B, which should be limited in that respect to the general statement contained in paragraph (2). Additional comments, including an illustrative list of possible criteria to be taken into account by enacting States, might be provided in a guide to enactment of the draft uniform rules.

42. The Working Group agreed that the question whether a definition of "certification authority" was needed in the draft uniform rules for purposes other than defining the criteria to be applied by each enacting State for the recognition of certificates issued by foreign certification authorities might need to be discussed further at a later stage. It was widely felt that, while the establishment of standards or criteria might help certification authorities in generating the level of trust necessary to their operation, it might be necessary to distinguish between the general issues of trustworthiness of certification authorities, which might depend upon the legal regime under which they were established, and the more specific issues related to the level of trust generated by the individual certificates issued by the certification authority.

43. The view was expressed that provisions concerning the functions and duties of certification authorities, such as set forth in draft article B, were not only relevant as structural elements of a system of certification authorities (e.g. a public-key infrastructure). Provisions of that type were also relevant for the purpose of determining the effects to be granted to digital signatures and acts related to, or involving the use of, digital signatures. Against that background, it was suggested that, in its deliberations on that matter, the Working Group might benefit from bearing in mind a spectrum of factors relevant for determining the legal effects to be granted to digital signatures. The following factors were offered as an analytic tool for consideration by the Working Group: (a) types of signatures (which, in decreasing order of generality, included electronic signatures; digital signatures; digital signature with certificate and digital signature with certificate from a publicly authorized certification authority); (b) parties affected (i.e. immediate contracting parties, including certification authorities; third parties such as shippers and banks; governmental entities; other persons such as service providers, communications carriers); (c) acts or events to be given legal effect (i.e. the use of digital signature; the issuance of a certificate, including unauthorized issuance; the expiration of a certificate; the revocation of a certificate; the revocation of an authorization given to a certification authority); (d) scope of the work of UNCITRAL in that area (international application only; international application plus proposals for domestic laws; proposals for domestic laws); (e) legal effect (i.e. validity; obligations of issuer of certificates and of person relying on certificates; remedies; liability, including limits to liability; evidence); (f) drafting techniques (i.e. prescription of standards; legal effect if standards were met; legal effect if standards were not met). The Working
Group considered the proposed list of factors to be a useful instrument to facilitate its analysis of the purpose and implications of provisions concerning certification authorities.

44. In its ensuing discussions, the Working Group examined the question whether it would be desirable for the draft uniform rules to include operation criteria to be met by certification authorities, whether authorized or not.

45. It was suggested that, in addition to the provisions it already contained, draft article B should be supplemented with uniform rules expressly mentioning the criteria which should be taken into account when authorizing certification authorities to operate or otherwise defining the minimum standards to be met by certification authorities in order to achieve legal recognition of the certificates they issued. Reference to such criteria was necessary if the draft uniform rules were to deal with certification authorities. It was recalled that paragraph 44 of the note by the Secretariat (A/CN.9/WG.1/IV/ WP.71) listed a number of factors that might be taken into account when assessing the trustworthiness of a certification authority. It was generally found that such a list constituted a good basis for discussion, should the Working Group wish to consider the matter further. It was suggested that some of those criteria might be expanded so as to encompass factors such as the competence of the personnel at the managerial level or the isolation of the certifying function from any other business that the certification authority might pursue.

46. Objections were voiced to the inclusion of operation criteria for certification authorities in the draft uniform rules. The Working Group was reminded of its earlier discussion concerning the role of public authorities in the implementation of public-key infrastructures and the possibility that in some States private entities would exercise certifying functions without requiring prior governmental authorization (see paragraph 46, above). Also, other acceptable alternatives to governmentally-approved criteria might be considered, such as internationally-recognized commercial usages and practices or qualification standards developed by reputable non-governmental entities, as was the case in certain fields of commercial activities. It was felt that the proposed inclusion of criteria to be taken into account when authorizing certification authorities to operate would be neither relevant nor appropriate in the case of certification authorities that did not operate pursuant to a governmental authorization. Furthermore, the inclusion of any such criteria would make it necessary to identify the entity or authority competent for establishing whether any particular certification authority met the said criteria. Such a system would lead to difficulties in the case of certification authorities that operated outside a public-key infrastructure implemented by public authorities.

47. In response to those objections, it was recalled that the provision of commonly accepted criteria for the operation of certification authorities might be an important step towards enhancing the trustworthiness of digital signatures. Such criteria might not be needed as long as electronic transactions took place between parties operating within a closed system which they regarded as being reasonably reliable. Trusted partners operating in such closed systems might in fact dispense with certificates issued by certification authorities. However, in order to allow for a wider use of digital signatures, it would be necessary to promote the confidence of the general public in the authenticity of the signatures and in the reliability of the methods being used for their verification. One important way of achieving that purpose was to satisfy the general public that entities engaging in the business of certifying the authenticity of a public key had to meet certain criteria devised to ensure their trustworthiness. While the Working Group should not discard the possible role of commercial usages and practices, or of non-governmental entities in developing acceptable operation standards for any particular field of commercial activity, it was noted that no established practice had yet evolved for determining acceptable operation criteria for certification authorities.

48. It was suggested that the two alternatives under debate, namely the establishment of criteria for a governmental authorization of certification authorities and the recognition of operation criteria for certification authorities functioning outside a governmentally-implemented public-key infrastructure, might not be mutually exclusive. The difference between those two situations might reside in the legal effects given to digital signatures in one or the other case. In the case of governmentally-authorized certification authorities, the fulfillment of the applicable operation criteria by a certification authority would constitute a prerequisite for the authorization of that certification authority, which, in turn, would be a condition for the recognition of the legal effectiveness of the certificates issued by that certification authority. In the second situation, a certification authority would not need to demonstrate that the operation criteria were met prior to beginning to function. However, if the certificates it issued were to be challenged (e.g. in a judicial dispute or arbitration), the adjudicating body would need to assess the trustworthiness of the certificate by determining whether it had been issued by a certification authority meeting those criteria.

49. A view was expressed that the trustworthiness of a certificate might depend on the actions of a certification authority with respect to that particular certificate, not on institutional factors. Such "transactional" trustworthiness would not necessarily depend on the authorized or non-authorized nature of the certification authority or on internationally-recognized commercial usages and practices. It was suggested that the criteria of trustworthiness would depend on the purpose for which trustworthiness was assessed (e.g. cross-certification, the granting of a licence, determination of liability).

50. Given the early stage of its deliberations and the conflicting views expressed on that subject, there was general support to the proposal that the Working Group should keep the above-mentioned suggestions as possible working assumptions and should revert to those issues at a later stage, after considering other questions intrinsically related thereto, such as the question of the liability of certification authorities and issues of cross-border certification.
2. Liability

51. The Working Group based its discussion of the liability of certification authorities on the following draft provision:

"Draft article H"

(1) An authorized certification authority shall be liable to any person who has acted in good faith in reliance on a certificate issued by the certification authority for any loss due to defects in the registration of the certification authority, technical breakdowns or similar circumstances [even if the loss is not due][if the loss is due] to negligence by the certification authority.

(2) Variant X The liability for any individual loss shall not exceed [amount]. The ... the enacting State specifies the organ or authority competent to revise the maximum amount may regulate this amount every second year to reflect price developments.

Variant Y The ... the enacting State specifies the organ or authority competent to promulgate liability regulations may promulgate regulations on the liability of certification authorities.

(3) In case the party who has sustained the loss has contributed to this wilfully or negligently, the compensation may be reduced or may not be granted.

(4) Where an authorized certification authority has received notice of revocation of a certificate, the authority shall register such revocation forthwith. If the authority fails to do so, it shall be liable for any resulting loss sustained by the user.

Paragraphs (1) and (2)

General remarks

52. The Working Group engaged in a discussion concerning the scope and implications of the proposed rules on the liability of certification authorities. It was stated that the issue of liability of certification authorities involved two different types of liability: a "structural" liability, which resulted from the breach by the certification authority of its terms of operation, and a "transactional" liability, which resulted from the certification authority's actions in issuing, suspending or revoking a certificate. In the first case, the certification authority was in breach of the public confidence placed upon it, and it would be appropriate for the authorizing public entity to levy fines or impose other sanctions, commensurate with the gravity of the violation. In the second case, the certification authority was in breach of its professional obligations to its own customer. However, the loss would often be sustained by the latter's trading partner, who in most cases would not have a contractual relationship with the certification authority. Under those circumstances, it was asked whether it would be appropriate for the injured party to have direct recourse against the certification authority, or whether the injured party should have a right of redress against its trading partner only, who, in turn, might have recourse against the certification authority. It was suggested that it would be difficult to establish an adequate regime of liability in which the user of a certificate would have direct recourse against the certification authority.

53. The view was expressed that it might be preferable for the Working Group to avoid dealing with the liability of certification authorities, since that was a delicate and complex issue that could not adequately be dealt with in the draft uniform rules. It was recalled that, within the context of the Model Law, it had been decided to avoid the issue of liability of third-party service providers altogether. It was suggested that the question of liability was closely related to the question of damages, which might not easily lend itself to international harmonization. The Working Group was invited to consider whether it would be more appropriate to exclude both questions from the scope of the draft uniform rules and leave them for the applicable national law. If such an approach was to be adopted, the following alternatives could be considered: to leave it for national conflict-of-laws rules to determine the law applicable to the questions of liability and damages; to draft a specific uniform conflict-of-laws rule; or to determine directly which conflict-of-laws rule should be applied (e.g. the conflict-of-laws rule of the country in which the certification authority was registered or otherwise authorized to do business). In support of that suggestion it was stated that the question of liability was essentially a question of the warranties provided by the certification authority, which was best left for the contracting partners to regulate, or should be determined in accordance with the national law that applied to their contractual relationship.

54. Strong support was expressed, however, for including provisions on the liability of certification authorities in the draft uniform rules. The issue of liability was described as too important to be left entirely to the parties to regulate, particularly in view of the fact that not all users of certificates might be in a direct contractual relationship with the certification authority. Limiting the user's rights to seeking redress from its trading partner for failures by the certification authority would leave unprotected those persons who were victims of fraudulent acts involving the use of fictitious names or identities with the knowledge or the contributory negligence of the certification authority. Furthermore, the lack of uniform rules on the liability of certification authorities might lead to the undesirable situation in which some countries would only provide a dory level of liability with a view to attracting or fostering the establishment of certification authorities on their territories. The possible emergence of "certification heavens" might generate reluctance on the part of trading partners when considering the use of digital signatures, a situation which would not be in keeping with the objective of promoting electronic commerce. However difficult the subject might be, involving aspects of both contractual and tortious liability, the prevailing view was that the question of the liability of certification authorities should be dealt with in the uniform rules.

55. After discussion, the Working Group agreed that, in principle, the draft uniform rules should contain provi-
sions regarding the liability incurred by certification authorities in the context of their participation in digital signature schemes.

**Nature of liability**

56. Questions were raised concerning the nature of the liability of the certification authority, in particular whether such liability would be based on negligence or whether it would be defined as "strict liability", a notion which was also referred to as "objective liability" or "no-fault liability". Objections were raised to the inclusion of provisions making the certification authority strictly liable. It was stated that strict liability was a deviation from the general principle of tort law whereby a person was liable for his or her own negligence and, as such, was accepted in national law for exceptional reasons of public interest, such as certain strict liability regimes of persons conducting unreasonably hazardous activities. There was no compelling reason why certification authorities should be subject to a regime of strict liability. Moreover, such a regime would have the undesirable consequence of discouraging the emerging industry of certification authorities, thus limiting the possibilities of use of digital signatures. Furthermore, it was observed that certification authorities might provide different levels of service to their clients and to the general public, ranging from simply listing names of public key holders and their respective keys to more individually-tailored services involving guarantees of the authenticity of public keys and the identity of their holders. The level of obligation assumed by certification authorities as well as the fees they charged varied according to the type of service they provided. Bearing such a range of services in mind, it would not be reasonable to impose the same level of liability upon all certification authorities in all conceivable circumstances. It was thus suggested that the regime of liability applicable to certification authorities should be based on negligence, under one option provided under paragraph (1) of draft article H.

57. In response, it was observed that it would not be equitable to require that the injured party bear the burden of establishing the negligence of the certification authority. Given the high level of technical sophistication that might be expected from certification authorities and the high level of trust they were intended to generate, certification authorities should, in normal circumstances, be held liable whenever the issuance of faulty certificates resulted in damages. It was pointed out that, in some legal systems, certain professional categories (e.g. notaries public in certain civil law countries) were under an obligation to purchase third-party liability insurance or to participate in a common compensation fund for indemnifying parties injured as a result of their acts. It was suggested that the establishment of such a common compensation fund might be facilitated if certification authorities were to be organized within an institutional framework such as a licensing scheme.

58. It was suggested that the divergence of views expressed in the Working Group might be solved if, instead of a positive rule specifying the circumstances under which the certification authorities would be liable, the draft uniform rules contained a rule establishing a rebuttable presumption of liability. Under such a proposal, for example, in the event of erroneous identification of a person or erroneous attribution of a public key to a person, the certification authority would be held liable for the loss sustained by any injured party, unless the certification authority could demonstrate that it had done its best efforts to avoid the error. The certification authority could rebut the presumption, for example, by demonstrating that it had adhered to a standard of conduct that might be established by the uniform rules. It was noted that such a liability scheme, which was similar to schemes contemplated in some national laws concerning product liability, would provide additional protection to service users, without however imposing strict liability on the certification authority. The Working Group welcomed that proposal, which was generally felt to provide a viable approach for future consideration of the Working Group in dealing with the difficult issue of liability of certification authorities.

59. The Working Group proceeded to consider the circumstances that could excuse a faulty performance by the certification authority. It was suggested that, under the proposed liability scheme, the certification authority should be exempt from liability if it could demonstrate that it exercised reasonable care in identifying the public key holder or performing its authentication functions; that the errors resulted from the user’s own fault, as indicated in paragraph (3) of draft article H; or that the error was attributable to circumstances beyond the certification authority's control. It was generally felt that exempting events along those lines would be acceptable.

**Certification practice statements and party autonomy**

60. The view was expressed that in considering the issue of liability it was important to bear in mind the mutual expectations and interests of the user and the certification authority. The certification authority should be expected to disclose its certification practice statement (CPS), apprising the users, inter alia, of the methods and procedures it used for identifying the holder of public key. The user should be expected to reasonably ascertain that document. Moreover, users should have the duty to ascertain the current validity of a certificate (e.g. that the certificate had not been revoked) prior to relying on a certificate. Finally, users should be expected to act reasonably on the basis of the information available to them. To questions that were raised as to how the users could verify the validity of a certificate, it was replied that certification authorities could be required to maintain databases of valid certificates, as some already did, which would be accessible to interested parties for the purpose of verifying the validity of certificates. In response to that proposal it was suggested that, while it might be appropriate to encourage the users' diligence in dealing with certificates, the primary responsibility for the authenticity and validity of a certificate rested with the certification authority and great caution should be exercised prior to imposing duties on the users which might make them share that responsibility. In most cases, the users would not normally be in a position to ascertain a number of factors relevant to the validity of a certificate, such as the identification procedures used by the certification author-
ity, or whether the holder of the public key also held the corresponding private key. It would not be reasonable to shift any of those responsibilities to the user.

61. The Working Group engaged in a discussion of the role of certification practice statements and the extent to which they could play a role in limiting or otherwise defining the scope of liability assumed by certification authorities. For the purpose of protecting users' interests, certification authorities could be required to disclose the extent of such liability by means of corresponding provisions in the certification practice statements they issued. From a technological point of view, certification practice statements could be accessible in electronic form to persons using the services of a certification authority. The view was expressed that a party who requested the services of a certification authority should accept to be bound by the terms of a certification practice statement by making use of the services of a certification authority. Contractual arrangements entered into between the parties should take precedence over rules coming from other sources, and in that connection it was important to ensure the enforceability of those terms and conditions. It was suggested, however, that provisions as important to the relying parties as a limitation of liability should appear in the certificate itself and not merely in a document referred to in the certificate, however accessible that document might be.

62. It was widely felt in the Working Group that in devising a liability scheme for certification authorities due regard should be had to the need to preserve party autonomy. Reservations were expressed, however, about the possibility that a certification authority might avoid liability for its own negligence by virtue of liability exemption clauses or disclaimers contained in the certification practice statement or in any other document issued by that certification authority. It was stated that the receiver of a message who used a certificate to verify the authenticity of a digital signature often would not have a direct legal relationship with the certification authority and therefore would not be in a position to negotiate with the certification authority the terms of such liability provisions. Even the issuer of the message, who was an individual in a private relation with the certification authority, might not always be able to negotiate those terms, which in many cases would take the form of pre-established business conditions not open to amendments. In some legal systems a unilateral exclusion of limitation of liability would be contrary to public policy. If introduced, liability limits and exemptions should be pursuant to the law or should be approved by public authorities.

Limits of liability

63. The Working Group considered the question whether the liability of certification authorities should be subject to limits and how such limits could be established. As an objection to introducing liability limits for certification authorities, it was observed that such limits usually existed in fields of activity subject to some form of monopoly, as was the case of postal and telephonic services in a number of countries. However, in other fields of activity open to competition, there was no reason for such liability limits.

64. Various views were expressed, however, in support of establishing some form of limitation to the liability of certification authorities. The following points were made: (a) certification authorities constituted an emerging industry, the development of which might be hampered by exposing them to open-ended liability; (b) it was important to make it possible for certification authorities to determine the level of liability they were ready to assume and it might be a precondition to enable them to contract for adequate insurance coverage of their activities; and (c) it might happen that, with respect to digital signatures, the role of a certification authority would be limited to issuing a certificate, which in itself might have little or no quantifiable value. It was further stated that, where a certificate was issued to establish a link between a public key and a given individual, that certificate might be appended to a number of messages in a variety of different transactions, the total amount of which would in most cases be unforeseeable for the certification authority. It was pointed out that, in the case of credit card transactions, there existed means for authorizing each transaction individually, so that the credit card company could, for each instance where a credit card was used to conclude a transaction above a predetermined amount, estimate its potential liability in case of unauthorized use of the credit card. Such a possibility did not exist for certification authorities, which were normally unaware of the terms of the transactions carried out by their clients. Therefore, it would be difficult to establish a threshold or ceiling of liability by reference to the amount of the transaction for the purpose of which a digital signature was used. Given the infinite number of transactions to which one single certificate might relate, it was doubtful that certification authorities would be in a position to acquire third-party liability insurance at a reasonable cost.

65. With regard to the possible methods for limiting the amount of the liability incurred by certification authorities, a number of suggestions were discussed by the Working Group. One possible approach would be to determine a fixed amount, as suggested in variant X of paragraph (2) of draft article H. Other suggested approaches relied on a limitation of the liability by reference to a multiplier of the fee paid by the subscriber, a percentage of the transaction value or a percentage of the actual loss sustained by the injured party. It was pointed out, however, that the damage that might result from the acts of a certification authority was not easily quantifiable, so as to serve as an objective criterion for arriving at a fixed amount of liability. Also, the service rendered by a certification authority, and the fees it charged, often bore no relationship to the value of the transactions to which they related or to the damage that might be sustained by the parties. Other limitation schemes, such as the ones contained in the United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules) or in the UNCITRAL Model Law on International Credit Transfers, concerned transactions that involved quantifiable elements (e.g. the value of the goods, the amount of the credit transferred) that might not exist in the case under consideration.

66. Another possibility for limiting the liability consisted in excluding liability for certain types of damages,
such as "consequential" damages. With regard to the latter possibility, it was observed that the notion of "consequential damages", which was also referred to as "indirect damage", might be given different interpretations in different legal systems. It was thus suggested that it would be preferable to mention specifically the types of losses encompassed by that notion in respect of which the certification authority would not assume liability. While support was expressed in favor of developing an approach that would result in excluding liability for consequential damages, consistent with the approach taken by the UNCITRAL Model Law on International Credit Transfers, it was pointed out that such an approach might not be appropriate in the context of digital signatures and certification authorities. It was stated that damage would rarely result directly from the issuance of, for example, a fraudulent certificate, but rather from third-party reliance on an unreliable digital signature using such a certificate. To that extent, most conceivable damages resulting from the activities of certification authorities might be regarded as "consequential" or "indirect". A further suggestion was to use the element of "foreseeability" as a criterion for limiting liability of certification authorities. It was stated that the liability regime applicable to the seller of goods under the United Nations Convention on Contracts for the International Sale of Goods might need to be further explored as a possible point of reference.

67. Having regard to the variety of alternatives suggested, the Working Group requested the Secretariat to prepare a brief report on existing legal regimes and methods used for limiting liability, particularly under international conventions applicable to the transport of goods and the transport of passengers. Such a report could also examine the liability regime established under certain national laws for professional categories performing, in a paper-based environment, functions akin to those contemplated for certification authorities.

**Minimum standard of liability**

68. It was noted that, at the current stage of its deliberations, the Working Group was still considering whether certification authorities should require prior authorization from a public entity. It was suggested that, when reverting to that issue in the context of its continued discussion of draft article A, the Working Group should also consider whether such authorizing public entity would be subsidiarily liable for the acts of the certification authority.

69. With respect to paragraphs (1) and (2), the Working Group adopted as a provisional conclusion that the liability regime applicable to certification authorities should be based on a "dual approach", namely, that it should recognize that liability might vary depending on whether a certification authority had standards imposed on it by a public entity, or whether it merely functioned on the basis of privately-agreed standards.

70. It was suggested that any certification authority, when issuing a certificate, should be under an obligation which might read as follows:

"By issuing a certificate, a certification authority represents that it has confirmed that:

(1) the certification authority had complied with all applicable requirements of these Rules in issuing the certificate, and if the certification authority has published the certificate in a public key or otherwise reliance on the certificate as a digital signature verifiable by the public key listed in the certificate, that the holder listed in the certificate has accepted it;

(2) the holder identified in the certificate holds the private key corresponding to the public key listed in the certificate;

(3) the holder's public key and private key constitute a functioning key pair;

(4) all information in the certificate is accurate, unless the certification authority has stated in the certificate [or incorporated by reference in the certificate] a statement that the accuracy of specified information is not confirmed;

and

(5) to the certification authority's knowledge, there are no known, material facts omitted from the certificate which would, if known, adversely affect the reliability of the foregoing representations."

It was generally agreed that the suggested wording was, for the most part, acceptable in substance as the basis for future discussions, as setting a minimum standard from which the parties should not be allowed to derogate by private agreement. In particular, no clause limiting the liability of a certification authority should be considered within the scope of any protection or benefit provided by the uniform rules if it conflicted with the above-mentioned requirements. Where the liability of a certification authority was alleged, the certification authority would be presumed to be liable for the consequences of issuing a certificate, unless it could prove that it had met the above-mentioned requirements. However, should a certification authority wish to undertake obligations stricter than the above-listed representations, it should be allowed to do so, by way of clauses included in a certification practice statement or otherwise.

71. The Working Group agreed that the above-mentioned minimum standard should be applicable to the issuance of certificates for the purposes of digital signatures, as defined in draft article A. It was generally agreed that the draft uniform rules should not attempt to deal with other activities or services that might be performed by certification authorities. Such activities and services might be subject to any contractual arrangement between certification authorities and their customers, and to any other applicable law (e.g. mandatory rules of law regarding the acceptability of liability exemption clauses).

**Paragraphs (3) and (4)**

72. The Working Group found the substance of paragraphs (3) and (4) to be generally acceptable as a basis for future discussions. With respect to paragraph (3), it was generally found that, while the principle of contributory negligence might need to be borne in mind when
preparing a revised version of draft article H, the specific provision contained in paragraph (3) might no longer be necessary, in view of the decision of the Working Group that the liability regime applicable to certification authorities should not be based only on negligence. With respect to paragraph (4), it was decided that the words “sustained by the user” should be deleted to extend the scope of the provision to losses sustained by any interested party.

73. After discussion, the Working Group requested the Secretariat to prepare a revised draft of article H, taking into account the above deliberations and decisions.

3. Issues of cross-border certification

74. The Working Group based its discussion of the issues of cross-border certification on the following draft provision:

“Draft article I

“(1) Certificates issued by foreign certification authorities may be used for digital signatures on the same terms as digital signatures subject to [this Law] [these Rules] if they are recognized by an authorized certification authority, and the authorized certification authority guarantees, to the same extent as its own certificates, the correctness of the details of the certificate as well as the certificate being valid and in force.

“(2) The ... [the enacting State specifies the organ or authority competent to establish rules in connection with the approval of foreign certificates] is authorized to approve foreign certificates and to lay down specific rules for such approval.”

75. Prior to beginning its deliberations on issues of cross-border certification, the Working Group was reminded that, under the mandate it received from the Commission, the Working Group was expected to advise the Commission as to the desirability and feasibility of preparing uniform rules on digital signatures, certification authorities and related issues (see paragraph 9, above). That mandate did not require the Working Group, at the current juncture, to finalize a draft text for consideration by the Commission at its thirtieth session.

76. The Working Group was also reminded of its previous discussions concerning the role of certification authorities within the framework of draft article B, particularly the differing views that had been expressed as to whether certification authorities would need to obtain governmental approval to operate (see paragraphs 48-50, above). The Working Group generally felt that it should be able to advance its deliberations on that issue after having considered issues of liability of certification authorities and cross-border certification. At the same time, it was noted that a decision on the issues raised by draft article B would also have implications for the regime of cross-border certification contemplated in the draft uniform rules.

77. As a general remark, the view was expressed that paragraphs (1) and (2) addressed the relationship between certificates issued by domestic certification authorities and foreign certificates from somewhat different angles. Paragraph (1) enabled a domestic certification authority to guarantee, to the same extent as its own certificates, the correctness of the details of the foreign certificate, and to guarantee that the foreign certificate was valid and in force. Under paragraph (2), the organ or authority competent for authorizing certification authorities in the enacting State was given the possibility of recognizing certificates issued by foreign certification authorities under the conditions it stipulated. It was suggested that the matters dealt with in paragraph (1) could be referred to as “cross-certification”, while paragraph (2) dealt with a situation that would more accurately be referred to as “cross-border recognition”. Those different issues might be better addressed separately.

78. The view was expressed that paragraphs (1) and (2) contained two different options for a possible regime of foreign certificates under the draft uniform rules. Support was expressed in favour of each of the two options. It was widely felt, however, that those two options should not necessarily be regarded as mutually exclusive. While support was expressed in favour of placing the substance of paragraphs (1) and (2) under two separate articles, it was suggested that their respective spheres of application deserved further consideration. It was stated that paragraph (1) essentially contained a provision on the allocation of liability to the domestic certification authority in the event that the foreign certificate was found to be defective, a liability to be derived from draft article H. Paragraph (2), in turn, was not concerned with liability issues, but with the legal effects that might be produced directly by a foreign certificate, for example where that foreign certificate would be relied upon in the context of a dispute before the courts of the enacting State. Those legal effects were not necessarily predicated upon, or affected by, the existence of the guarantee contemplated in paragraph (1).

79. In view of the decision made by the Working Group to deal in the draft uniform rules not only with certification authorities licensed by public entities but also with “market-driven certification authorities” (see paragraphs 48-50, above), it was widely felt that draft article I should deal with the recognition of foreign certificates issued by both types of certification authorities.

80. It was suggested that the Working Group should also consider the question of the conditions under which foreign certificates could be recognized. Such conditions could take the form of governmental requirements, or be provided in arrangements between domestic and foreign certification authorities. Explanations were provided as to conceivable ways in which such arrangements between certification authorities might be structured. It was recalled that a public-key infrastructure was often based on various hierarchical levels of authority. Within those hierarchical structures, two stages of cross-certification seemed likely to occur. At an initial stage it was expected that cross-certification would be reserved exclusively to the “root authorities” (i.e. those authorities that certified the technology and practices in connection with the use of key pairs and registered subordinate certification
of credit issued by a foreign bank. The acceptability of the correctness and the validity of a foreign certificate and that of a financial institution that guaranteed a letter of credit sought by the recipient of the message when formulating provisions on cross-certification or recognition of public-key and digital signature. It was suggested that the certification authority, a lesser degree of trustworthiness would be reached where the domestic certification authority would guarantee the contents of a foreign certificate based on the information it had received as to the trustworthiness of the foreign certification authority without deeming it necessary to obtain a guarantee from a domestic certification authority without deeming it necessary to obtain a guarantee from a domestic certification authority.

81. It was stated that the inclusion of provisions dealing with issues of cross-border recognition might represent a significant step towards enhancing the trustworthiness of certificates. However, the methods and procedures for such cross-border certification or recognition had to be carefully considered by the Working Group. It was stated that, in assessing the trustworthiness of a foreign certificate, the recipient of a digitally signed message accompanied by the certificate should consider a number of questions, such as the following: whether the certification authority issuing the certificate was authorized to act abroad; whether the digital signature of the certification authority was authentic; whether legal recourse was available against the certification authority; whether the digital signature had been recognized to produce legal effects; and whether the digital signature could be enforced against its author.

82. From that perspective, it was further stated that cross-certification could basically provide four different levels of trustworthiness. At the highest level, the domestic certification authority, upon request of the party relying on a foreign certificate, would guarantee the contents of that certificate on the basis of its declared knowledge of the procedures that had led to the issuance of the certificate, thus assuming full liability for any errors or other defects in the certificate. At the immediately lower level, the domestic certification authority would guarantee the content of a foreign certificate based on the information it had received as to the trustworthiness of the foreign certification authority. A lesser degree of trustworthiness would be reached where the domestic certification authority limited its commitment to guaranteeing the trustworthiness of the foreign certification authority without assuming any liability for the contents of the foreign certificate. At the lowest level, the domestic certification authority would merely guarantee the identity of the foreign certification authority, based on a verification of its public-key and digital signature. It was suggested that the Working Group should pay attention to the level of comfort sought by the recipient of the message when formulating provisions on cross-certification or recognition of foreign certificates.

83. In that connection, a comparison was made between the position of a certification authority that guaranteed the correctness and the validity of a foreign certificate and that of a financial institution that guaranteed a letter of credit issued by a foreign bank. The acceptability of the letter of credit by its beneficiary was dependent upon factors such as the trustworthiness of the foreign bank issuing the letter of credit and the enforceability of that letter of credit in the country of the beneficiary. In some cases, the beneficiary might insist on obtaining a counter-guarantee from a local bank. The adequate level of security for the transactions would be established by the beneficiary of the letter of credit having regard to the level of risk the beneficiary was ready to assume. Similarly, a party to a transaction involving the use of a foreign certificate might be satisfied, for instance, with knowing that the certificate had been issued by a reputable foreign certification authority without deeming it necessary to obtain a guarantee from a domestic certification authority. The concern was expressed that draft article I might be perceived as discouraging or precluding the use of certificates that were not guaranteed by a domestic certification authority, even in the case of transactions where the parties felt reasonably confident with a lesser degree of security or legal certainty. It was important to ensure that draft article I dealt with the issues of cross-certification and cross-border recognition in a flexible manner.

84. In connection with the above comparison between the role of certification authorities and that of banks in the context of letter-of-credit transactions, it was generally felt that, in preparing uniform rules for the recognition of certificates, it should be borne in mind that digital signatures might be used not only for transferring rights but also for transferring obligations, for example where a digital signature was appended to a notice relating to an assignment of a debt. Therefore, the risk arising from reliance on a digital signature might need to be allocated to the recipient or to the issuer of the digital signature, depending on the type of transaction involved.

85. With regard to the possible scope of cross-certification and recognition, it was stated that, to a certain extent, functions performed by a certification authority resembled functions performed by a notary public under some legal systems. Indeed, in a number of legal systems certain types of transactions required that a notary public or another official performing similar functions certified certain facts (e.g. the identity of one of the parties) or elements of the transaction (e.g. the signature of the parties or the authenticity of a document). However, the transactions for which such certification by a notary public were needed varied among different legal systems, and it would not be feasible to attempt to harmonize such solutions concerning formality requirements for the underlying transactions.

86. The view was expressed that the recognition of foreign certificates would often be provided on the basis of reciprocity, and therefore the authority for such recognition would be derived from bilateral or multilateral international agreements. Reservations were voiced to making reference to reciprocity in the draft uniform rules, given the varying meaning of "reciprocity" in different legal systems. The suggested addition of a reference to bilateral or multilateral international agreements, on the other hand, attracted varying reactions. In support of that suggestion, it was stated that making reference to bilateral or multilateral international agreements would make it clear
that the draft uniform rules did not affect the international obligations that States might assume, for instance within the framework of regional agreements on economic integration or cooperation. However, it was also stated that no special reference to such agreements was needed, since nothing in paragraph (1) prevented the enacting State from achieving cross-certification or recognition of foreign certificates through such agreements. It was further suggested that, instead of referring to international agreements in draft article I, the Working Group should consider formulating substantive rules for the recognition of foreign certificates. It was said that a reference to bilateral or multilateral international agreements within the context of article I should be avoided unless: (a) the Working Group came to the conclusion that it was not feasible to establish harmonized rules of recognition; or (b) such a reference related to agreements that provided a more favourable level of recognition of foreign certificates than the one provided in the draft uniform rules.

87. It was stated that paragraphs (1) and (2) contained two different options available to the enacting State, depending on whether or not the operation of a certification authority required prior governmental approval. However, the concern was voiced that, when read in conjunction with draft article B, which required such prior approval for certification authorities established in the enacting State, paragraph (1) might be read as allowing the recognition of certificates issued by foreign certification authorities which had not been authorized to operate under domestic rules, while denying legal effectiveness to certificates issued by domestic certification authorities that had not received the required authorization in the enacting State. In that connection, a question was raised as to whether the purpose of draft article I was to make it possible for a governmentally-authorized certification authority to extend legal value to certificates issued by other, unauthorized certification authorities, domestic or foreign. If that was its intended purpose, draft article I might need to be revised in the light of the decision to be made by the Working Group with respect to draft article B.

88. In respect of the guarantees provided under paragraph (1), it was stated that some legal systems might have difficulties in dealing with that issue in view of the fact that warranties provided by certification authorities might vary greatly in different countries. If it would be difficult for domestic certification authorities to assume liability for certificates issued abroad without a common ground concerning the types of warranties offered by certification authorities.

89. After considering the different views expressed in the Working Group, it was generally felt that it was appropriate to deal with the issues of cross-border certification in the draft uniform rules. While the principles reflected in draft article I were regarded as broadly acceptable, it would be premature for the Working Group to attempt to formulate detailed provisions on those issues at such an early stage in its deliberations. The Secretariat was requested to prepare a revised draft of article I, taking into account the above deliberations, and based on the need to accommodate both publicly-licensed and non-licensed certification authorities. The Secretariat was requested to distinguish between the conditions and effects of recognition of a digital signature and a certificate, on the one hand, and the recognition of a certification authority on the other hand, and to make appropriate proposals, possibly in the form of variants, for dealing with those different issues.

I. Definitions (continued)

(b) Authorized certification authorities (continued)

90. Having completed its preliminary consideration of the issues of liability and cross-certification under draft articles H and I, the Working Group resumed its deliberations on the issues raised by the definition of “certification authority” under draft article B (see paragraphs 40-49, above). It was recalled that, in order to accommodate both the situation where certification authorities operated on a purely private basis and the situation where certification authorities should be licensed or otherwise authorized by public authorities before they were allowed to operate, the Working Group had decided, tentatively, to adopt a “dual approach” (see paragraphs 48-50, above), which suggested the need for a broad definition of “certification authority” to cover both types of situations. In that connection, it was suggested that the Working Group might give consideration to the possibility of replacing the notion of “certification authority” by that of “certification entity”, to avoid the possible implication that functions of certification were necessarily performed by public authorities. While support was expressed in favour of that suggestion, it was recalled that the notion of “certification authority” was already used widely, by both public and private entities. The Working Group was urged to exert caution in adopting terminology that might contradict emerging certification practice.

91. It was pointed out that the provisions currently embodied by draft article B addressed various aspects of certification authorities. While certain paragraphs, such as paragraph (3), were of a purely definitional nature, other provisions, such as paragraph (4), were more operational and descriptive of the functions performed by certification authorities. It was thus suggested that draft article B might need to be subdivided into different articles, dealing with the definition and the functions of certification authorities, respectively. It was widely felt that, in restructuring draft article B, it might be appropriate to refer to functions that might be performed by certification authorities in addition to time-stamping, such as the issuance of key pairs, maintenance of directories, retention of records and other services, which were described as “ancillary” to the main functions performed by certification authorities, respectively. It was generally agreed, however, that the effect of addressing such ancillary services should not be to expand the scope of the uniform rules, as defined by reference to “digital signatures” in draft article A.

92. As a possible distinction between the legal regimes applicable to certification authorities licensed or otherwise authorized by the enacting State, and to non-author-
ized certification authorities, it was suggested that the draft uniform rules should spell out the specific legal effects that might be expected from the issuance of certificates by authorized certification authorities. In response to a question that was raised as to the legal effects that might flow from the issuance of certificates by non-authorized certification authorities, it was suggested that the matter might be dealt with by way of a mere reference to article 7 of the Model Law. While support was expressed in favour of that proposal, it was stated that it might be appropriate for the uniform rules to elaborate on the legal effects achieved by certificates that emanated from purely private certification authorities. Another suggestion was that a possible distinction between authorized and non-authorized authorities might be based on different functions that might be performed by the two types of authorities. It was generally felt that those issues might deserve further consideration by the Working Group at a future session.

93. In the context of the discussion of paragraph (3), a question was raised as to whether the reference to “keys of natural and legal persons” provided sufficient guidance in situations where cryptographic keys were issued directly to electronic devices, or used by such devices, in the absence of direct human intervention. The Working Group recalled that the issue had been discussed in the context of the preparation of the Model Law, and generally agreed that it might need to be discussed further at a later stage in connection with the issues of digital signatures.

94. As to the possible structure of a revised draft of article B, the attention of the Working Group was drawn to the method followed with respect to the Model Law, which relied on a combination of statutory provisions with a guide to enactment of such provisions. Adopting that method made it possible to include more detailed explanations and illustrations as to the contents of the statutory provisions, thus facilitating their future consideration by legislators. It was suggested that the same approach should be taken with respect to the uniform rules. Particularly in dealing with the various functions performed by certification authorities, it would be appropriate to include explanatory material in the context of a guide to enactment. The Working Group, while postponing its decision as to the final form of the uniform rules, found that suggestion to be generally acceptable as a working assumption.

95. After discussion, the Working Group decided that the provisions currently found in draft article B should be relocated in two separate articles, dealing with an expanded definition of “certification authority”, and with the functions performed by certification authorities, respectively. It was decided that the general definition of “certification authority” should be based on the text of paragraph (3) of draft article B. It was agreed that the reference to “natural and legal persons” should be complemented by a reference to “electronic devices”, which should be placed between square brackets, pending future consideration by the Working Group. In addition to a general definition of “certification authority”, the revised definitional article should contain a definition of “li-

96. It was generally agreed that the separate article, which should deal with the various functions provided by certification authorities, could be based on paragraph (4) of draft article B. It was also agreed that the scope of a future article on functions of certification authorities might appropriately be expanded to cover other functions. To that effect, elements might be drawn from existing pieces of legislation, guidelines and model contracts in use or being considered for adoption with respect to certification authorities. As a matter of drafting, it was generally felt that the reference to “communication secured by means of digital signatures” in paragraph (4) might need to be amended to avoid suggesting particular implications as to the acceptability of security methods used by certification authorities.

97. The Secretariat was requested to prepare a revised draft of article B, taking into account the above deliberations and decisions.

(c) Certificates

98. The Working Group based its discussion of the definition of certificates on the following draft provision:

Draft article C

“The certificate issued by an authorized certification authority, in the form of a data message or otherwise, shall indicate at least:

(a) the user’s name [and address or place of business];

(b) the day and year of birth [sufficient identification] of the user if the user is a natural person;

(c) if the user is a legal person, the name of the company and any relevant information for identifying that company;

(d) the name, address or place of business of the certification authority;

(e) the user’s public cryptographic key;

(f) any necessary information indicating how verification of the user’s public cryptographic key is available to the recipient of the digital signature given according to the certificate;

(g) the serial number of the certificate; and

(h) the [date of issuance and the date of expiry] [validity period] of the certificate.”

99. At the outset, the Working Group was reminded that, during its deliberations on the definition of “certification authority”, the Working Group had agreed, as a working assumption, to adopt a flexible approach that covered certificates issued by both governmentally-authorized certification authorities and certification
authorities functioning outside a governmentally-implemented public-key infrastructure, without at the current stage excluding either of those alternatives. Consistent with that working assumption, the word "authorized" in the chapeau of draft article C should be deleted.

100. General remarks were made concerning the terminology of draft article C, in particular the use of the word "user" with reference to the holder of the private key of a cryptographic key pair. That word was felt to lend itself to confusion with the recipient of a message, who could be regarded as being the "user" of the certificate or of the public key used for verifying the digital signature. A number of alternatives were suggested, including the expressions "owner of the key pair", "holder of the certificate", "holder of the private key". It was agreed that the Secretariat should review the terminology used in draft article C and in the remaining provisions of the draft uniform rules and formulate proposals for avoiding possible ambiguities.

101. It was widely felt that draft article C should define "certificate" prior to mentioning its required content. One proposed definition was along the following lines: "A certificate is a data message that purports to be a certificate, identifies the certification authority, contains the public key of the user, names the user and is digitally signed by the certification authority." Another proposal was that a definition should be based on the elements of a certificate contained in the note by the Secretariat, which referred to the certificate as being an electronic record that listed a public key together with the name of the certificate subscriber as the "subject" of the certificate, and confirmed that the prospective signer identified in the certificate held the corresponding private key (A/CN.9/WG.IV/WP.71, para 36). It was felt that a definition such as that suggested in the latter proposal would be generally acceptable. However, such a definition should specify that, if the certificate was delivered by electronic communication, the certification authority should digitally sign it to assure the authenticity of the certificate with respect to both its contents and source.

102. A question was raised as to whether the words "at least" in the chapeau of draft article C in connection with the content of a certificate meant that a certificate which did not contain all the information and data listed in draft article C would not be regarded as a certificate within the meaning of the draft uniform rules. In reply, it was stated that, as currently drafted, the draft article mentioned a number of mandatory elements that had to be contained in a certificate in order for it to be regarded as such under the draft uniform rules. For clarity purposes, it was suggested that the definition of "certificate" should be a self-contained provision and that the information required to be provided in a certificate should be listed in a separate provision.

103. The Working Group discussed the level of information that should be contained in a certificate. As a general remark, it was suggested that the mandatory elements should be kept to a minimum and should include essentially the information that was required in order for the user of the certificate to be able to verify the digital signature used in a data message. The concern was expressed that the inclusion of unnecessary elements among the information to be contained in a certificate might inadvertently exclude from the ambit of the draft uniform rules a number of certificates which might otherwise be sufficient for the purposes for which they had been issued. The view was expressed that it was important to bear in mind the difference between the information contained in a certificate and the steps that had to be taken by the certification authority to establish the accuracy of that information. The more information was contained in a certificate, the greater the risk was that liability might be incurred by the certification authority. Accordingly, it was suggested that no minimum requirements should be established by the draft uniform rules as to the contents of a certificate.

104. A different approach was suggested, based on the discussion of the issue of liability of certification authorities, in the context of which it had been understood that, in the event of erroneous identification of a person or erroneous attribution of a public key to a person, the certification authority would be held liable for the loss sustained by any injured party unless the certification authority could demonstrate that it had exerted its best efforts to avoid the error (see paragraph 58, above). It was generally felt that it would be of little avail for the purpose of protecting the end-users to require the certification authority to follow adequate procedures for establishing the accuracy of the information, or properly identifying the holders of private keys, and at the same time to allow the certification authority to avoid liability by issuing certificates that fell below the minimum level of information required to be contained in a certificate.

105. It was suggested that, if the certificate had to meet a certain number of mandatory requirements as to its contents, a certification authority would not be free to avoid liability in the manner that had been alluded to. In that connection, it was recalled that in the discussion of the issue of liability of certification authorities, a proposal had been made that any certification authority, when issuing a certificate, should be under an obligation to represent that it had confirmed a number of elements (see paragraph 70, above). Strong support was expressed in favour of that suggestion. After discussion, the Working Group agreed that the matter could not be examined thoroughly at the current session. It was agreed that deliberations on the subject would need to be resumed at the earliest possible opportunity, on the basis of variants to be prepared by the Secretariat to reflect the above discussion.

106. With regard, in particular, to data that might be required for identifying the holder of the private key, it was suggested that subparagraphs (a), (b) and (c) should be combined into one single provision. In that connection it was noted that in many countries information regarding, for example, the date of birth of a person was protected as personal data, and specific rules might govern its disclosure by electronic means. Therefore, it was suggested that personal information of that kind should not be required to be contained in a certificate. In reply it was stated that in certain circumstances a person making an application for a certificate might consent to, or have an
interest in, the release of certain types of personal data or sources of additional information. The draft uniform rules should not preclude such a possibility in cases where the consensual release of personal data would not conflict with applicable rules on data protection or the public policy of the State where such application was made or the certificate was issued. It was generally felt that questions concerning data protection fell outside the scope of the draft uniform rules and that draft article C should require only that sufficient identification be provided consistent with applicable laws on data protection.

107. It was suggested that subparagraph (a) should refer to the user's "name or identification", so as to encompass situations in which the user would not be identified by its name but rather by other means of identification such as an account number, as could be the case of certificates relating to credit card transactions. That suggestion was objected to on the ground that it might encourage the use of anonymous messages and certificates, a situation which would not be in keeping with the objective of promoting greater legal certainty in electronic commerce. The Working Group was urged to retain reference to the name of the holder of the private key as an essential element of a certificate.

108. For the purpose of ensuring proper identification of the holder of the private key, it was suggested that draft article C should retain a reference to additional elements of identification such as the address, in the case of natural persons, or the registration number, in the case of legal entities, since the name of a person or company might not in itself be sufficient for identifying that person or company.

109. The view was expressed that the use of a digital signature might in some cases be restricted to certain types of transactions, for example as a result of limitations on the authority of the signor to bind the company in the name of which the transaction was made. It was thus suggested that the certificate should contain information on such restrictions or limitations, or should make reference to their source. In reply to that suggestion it was noted that the question of the limits within which a digital signature might be relied upon raised a number of difficult legal issues, which were not unique to electronic commerce. In a paper-based environment it might not be mandatory for a handwritten signature to be accompanied by a declaration on the limitations, if any, of the powers of its author. The Working Group was urged not to introduce, in connection with digital signatures, requirements more stringent than those that applied to handwritten signatures.

110. The Working Group was reminded of its earlier discussion concerning consumer issues and the liability of a certification authority and the possible limitations or exclusions of liability pursuant to national law or the certification authority's certification practice statement. It was suggested that the certification authority should be required to state such limitations or to make reference to a document accessible to the user, where such limitations could be found. It was also suggested that the draft uniform rules should provide the consequences that would flow from the absence of such indication in the certificate. Similarly, it was suggested that, where the validity period of a certificate was limited, such limitations should be mentioned in the certificate, in the form of an expiry date or an operational period. It was felt that it was important for the protection of users of certificates that they should be provided with information as to the validity of certificates and that they should not bear the risk that a certificate might be issued without such indication. Therefore, the draft uniform rules should contain a default provision specifying the validity period that would apply in the absence of such indication. However, it was pointed out that the existence of such a rule should be interpreted as meaning that the certification authority had the option to omit mentioning the validity or operation period of a certificate.

111. Questions were raised as to the type of information that certification authorities were able to provide the users of their services in accessible form taking into account the technology currently available. In response, it was stated that existing technology allowed the certification authorities to append or otherwise link to the certificates they issued additional information, such as their own certification practice statement or information optionally made available for that purpose by the holders of private keys. However, many computer systems currently in use by the customers of certification authorities were still incapable of accessing all such information. Besides such technical difficulties, it was important to bear in mind that some of the information that might be appended to certificates might originate from the holders of private keys and be released pursuant to their request. It was important in those cases to distinguish between elements of the certificate which were certified by the certification authority (e.g. identity of the private-key holder) from others provided by their customers and not verified by the certification authorities (e.g. limitations on the use of private keys within a corporation). The certification authorities should not be made liable for the accuracy of such non-verified information.

112. Various interventions were made to the effect that, without prejudice to other possible information that certification authorities might provide to their customers, they should represent and warrant that the accuracy and completeness of the information which was mandatorily to be contained in a certificate had been verified.

113. After considering the views expressed in connection with draft article C, the Working Group agreed that a definition of "certificate" should be added to the draft article. The mandatory content of the certificate should be provided in a separate provision, which should also deal with the consequences of the absence of mandatory elements of a certificate. That provision should reflect the elements referred to in subparagraphs (a), (b) and (c), combined into one single revised provision, and include also the information mentioned in subparagraphs (d), (e) and (h) of draft article C. The information referred to in subparagraph (f) was not considered capable of being certified by a certification authority and, accordingly, it was agreed to delete the subparagraph. It was agreed that subparagraph (g) should be placed within square brackets and considered at a later stage as a possible option, since
4. Signature by legal and natural persons

114. The Working Group based its discussion on the following draft provision:

"Draft article D"

"(1) Natural and legal persons may equally obtain certification of cryptographic public keys used exclusively for identification purposes.

"(2) A legal person may identify a data message by affixing to that message the public cryptographic key certified for that legal person. The legal person shall only be regarded as "the originator" having approved the sending of the message if the message is also digitally signed by the natural person authorized to act on behalf of that legal person."

115. A number of delegations expressed the view that that draft article D should be deleted. It was stated that distinguishing between legal and natural persons for the purposes of digital signatures was inappropriate in view of the fact that no such distinction was made in the Model Law, where the notion of "person" covered both natural and legal persons. Moreover, it was stated that paragraph (2) might inappropriately interfere with other bodies of law, e.g. agency law, and with the provisions of company law dealing with representation of companies by natural persons. Furthermore, it was stated that the rule contained in paragraph (2) appeared to impose on users of digital signatures a burden that went beyond existing requirements with respect to handwritten signatures.

116. The view was expressed, however, that draft article D, and more specifically paragraph (2), served a useful purpose. In particular, where no other applicable rule of law specified the form in which a binding signature might be given on behalf of a legal person, a default rule along the lines of paragraph (2) might provide useful guidance as to the circumstances under which a digital signature purported to be that of a legal person might be relied upon. Support was expressed in favour of retaining paragraph (2), provided that the provision was redrafted to indicate clearly that, although it contained a reference to "a natural person authorized to act on behalf" of a legal person, it was not intended to displace the domestic law of agency. The question as to whether the natural person did in fact and in law have the authority to act on behalf of the legal person would thus be left to the appropriate legal rules outside the uniform rules.

117. After discussion, the Working Group decided that draft article D should be placed between square brackets, for further consideration at a later session.

5. Attribution of digitally-signed messages

118. The Working Group based its discussion on the following draft provision:

"Draft article E"

"(1) The originator of a data message on which the originator’s digital signature is affixed is bound by the content of the message in the same manner as if the message had existed in a [manually] signed form in accordance with the law applicable to the content of the message.

"(2) The addressee of a data message on which a digital signature is affixed is entitled to regard the 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 the originator’s public key to the data message as received and the application of the originator’s public key revealed: that the received data message had been encrypted with the originator’s private cryptographic key; and that the initial message had not been altered after being encrypted through the use of the originator’s public cryptographic key;

"or"

"(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator enabled that person to gain access to the originator’s private cryptographic key.

"(3) Paragraph (2) does not apply:

"(a) as of the time when the addressee knew or should have known, had it sought information from the authorized certification authority or otherwise exercised reasonable care, that the validity of the originator’s public cryptographic key had expired, or that the certificate issued by the certification authority had been revoked or suspended;

"or"

"(b) in a case within paragraph (2)(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."

119. The view was expressed that draft article E should be deleted. In support of that view, it was stated that the draft article merely provided an industry-specific version of article 13 of the Model Law and might create uncertainty as to the possible interplay of the two provisions. Another view was that the draft article should be deleted because it might be misinterpreted as interfering with the law applicable to the commercial transaction for the purposes of which a digital signature was used. For example, the provisions of paragraph (1), under which the originator of a data message was "bound by the content of the message", might be read as inappropriately dealing with general contract law.

120. The prevailing view was that, while the specific drafting of draft article E might need to be modified, the
principle contained in paragraph (1) was useful in establishing the legal consequence of using a digital signature. As to how such a principle might be expressed, a suggestion was made that paragraph (1) should be redrafted in the form of an irrebuttable presumption to the effect that the holder of a digital signature would be deemed to be the signer of a data message to which that digital signature was affixed.

With respect to the possibility that the issue of attribution of digitally-signed messages might be dealt with by way of presumptions, whether rebuttable or not, it was suggested that further distinctions might need to be made according to the kind of transaction for which digital signatures might be used. For example, the same standard should not be used for purely commercial transactions between long-term trading partners and for the submission of tax declarations to public administrations.

It was suggested that a provision along the lines of paragraph (1) might need to distinguish between different kinds of digital signatures (e.g. the various levels of security performed by various algorithms, and the corresponding variation in the costs of digital signatures) and different circumstances under which digital signatures were used. It was suggested that, in preparing a revised draft of paragraph (1), the following categories might be taken into account: whether a digital signature was used outside any pre-existing contract between the parties; whether a digital signature was used in the context of a contractual framework; whether a digital signature involved the issuance of a certificate by a non-accredited certification authority; or whether a certificate was issued by a licensed certification authority. It was also suggested that, in dealing with the various levels of risk involved in the digital signature process in case of fraud, particular attention should be given to the situation where fraud occurred prior to the issuance of a key pair. In such a situation, in the absence of any agreement between the parties, the burden of establishing the link between the digital signature and the sender should be borne by the recipient. If a certificate was issued, and the certificate was appropriate and valid, the burden of proof might be shifted. Another suggestion was that, in dealing with messages certified by a certification authority, the party that designated a given certification authority should bear the risk involved by the use of the certificates issued by that certification authority.

Various views were expressed as to whether all of the above-mentioned categories should be taken into account in revising draft article E. It was recalled, in particular, that in the context of its discussion of liability issues, the Working Group had agreed to focus on situations where a certificate was issued. It was generally felt, however, that some or all of the suggested categories should be borne in mind when preparing a revised draft of article E for consideration by the Working Group at a future session.

After discussion, the Working Group agreed that a revised provision on attribution of digitally-signed messages was necessary for further consideration by the Working Group and that such a provision might be developed along the lines of paragraph (1) of draft article E. It was generally felt that appropriate comments might be needed to clarify the relationship between article E and articles 7 and 13 of the Model Law. The Secretariat was requested to prepare a revised draft of article E, with possible variants reflecting the above discussion.

6. Revocation of certificates

The Working Group based its discussion concerning revocation of certificates on the following draft provision:

"Draft article F"

"(1) The holder of a certified key pair may revoke the corresponding certificate. The revocation is effective from the time when it is [registered] [received] by the certification authority.

"(2) The holder of a certified key pair is under an obligation to revoke the corresponding certificate where the holder learns that the private cryptographic key has been lost, compromised or is in danger of being misused in other respects. If the holder fails to revoke the certificate in such a situation, the holder is liable for any loss sustained by third parties having relied on the content of messages as a result of the holder's failure to undertake such revocation."

Paragraph (1)

General remarks were made as to the meaning of paragraph (1). It was stated that the holder of the private key should always have the right to request the certification authority to revoke a certificate. The fact that such a revocation became effective upon receipt or registration by the certification authority should not be interpreted as a limitation to that right. Also, the fact that such a revocation became effective upon receipt or registration by the certification authority should not be interpreted to the effect that the third parties had the duty to ascertain the validity of a certificate (e.g. that the certificate had not been revoked) prior to relying on a certificate, a proposition which raised a number of objections in the Working Group (see paragraph 60, above).

Various views were expressed as to the time from which such a revocation was effective. Under one view, the revocation should be effective from the time it was registered by the certification authority, since the time of receipt might in some cases be difficult to establish, thus leading to uncertainties as to the point in time when a certificate ceased to be valid. Under another view, the certification authority should have the obligation to act promptly upon the revocation of a certificate so as to avoid any loss that might be sustained by the holder of the private key or third parties, and that might result, for instance, from a certificate being inadvertently accepted after such a certificate had been repudiated by its holder. Therefore, the effects of the revocation of a certificate should be dependent upon measures to be taken by the certification authority over which the holder of the private key had no control.
128. Questions were raised as to the possible effect of the registration of revocation of a certificate. In that connection, the view was expressed that the notion of registration of the revocation of a certificate might not be entirely adequate for the purposes intended by draft article F, which aimed, inter alia, at ensuring that third parties were apprised, as appropriate, of the fact that a particular certificate had been revoked. It was stated that, upon receipt of a request concerning the revocation, a certification authority might in some cases have to verify the authenticity of such request, a procedure which, depending upon the circumstances, might entail some delay. The appropriate moment for such revocation to become fully effective, therefore, was the time it was released to the public by being placed in a generally accessible database maintained by the certification authority, or by other appropriate publication method.

129. In view of the latter comments, it was stated that the receipt of the request for revocation was still preferable to the registration for the purpose of establishing the time from which the certificate was regarded as having been revoked. However, if the notion of receipt of such requests was not to be found sufficiently precise, the receipt should be combined with some action to be subsequently taken by the certification authority to effect such revocation, such as publicizing the revocation or issuing notice thereof.

130. In order to advance its deliberations on the subject, the Working Group was invited to consider the general implications of a choice regarding the time in which the revocation became effective, as well as the parties that might be affected by such revocation. The moment in which the revocation became effective would be crucial for determining the respective liabilities of the holder of the private key and the certification authorities as between themselves and vis-à-vis third parties. It was suggested that it might be advisable for the Working Group to consider dealing with each of those situations separately. In support of that proposal, it was pointed out that each of the alternatives currently contained in paragraph (1) had its own merits. As between the holder of the private key and the certification authority, it might be appropriate to provide that the revocation should become effective upon receipt by the certification authority of the request for revocation made by the holder of the private key. Vis-à-vis third parties, however, it might be more appropriate to require prior registration or publication in order for the notice to become effective.

131. It was pointed out that the effective time of the revocation had significant consequences for the liability of the certification authority and that both issues should be addressed in an harmonious manner. It was noted that draft article H, paragraph (4), provided that, where an authorized certification authority had received notice of revocation of a certificate, the authority should register such revocation forthwith. If the certification authority failed to do so, it should be liable for any resulting loss sustained by the user. Thus, if the draft uniform rules provided that revocation of a certificate became effective at the time when it was received, paragraph (4) of draft article H should be deleted since there could be no basis for the liability of the certification authority for fault or negligence in the registration of the revocation. However, if the revocation of a certificate was to become effective at the time when it was registered, there might be no need for a provision other than article H, paragraph (4).

132. In response to that comment it was stated that the rule contained in draft article H, paragraph (4), should be retained, irrespective of the choice of the Working Group concerning the two alternatives currently provided in article F, paragraph (1). Late registration of a request for revocation might be the cause of some loss, either to the owner or to the relying party, and therefore a rule on liability for the consequences of late registration would still be needed.

133. In that connection, it was stated that international standards and guidelines on electronic certification and authentication, such as the Uniform International Authentication and Certification Practice Guidelines being prepared by the International Chamber of Commerce, reflected the principle that a certification authority had to act promptly on a request for revocation of a certificate. However, as had been previously noted, there might be some delay in giving effect to such a request, particularly where, under the circumstances, the certification authority needed to conduct some verification, such as to confirm the authority of the persons who requested the revocation on behalf of the holder of the private key. In order to avoid an inadvertent use of the certificate during the period where a request for its revocation was being verified by a certification authority, it was suggested to include in the draft uniform rules a provision whereby a certification authority should suspend a certificate promptly upon request of a holder of a private key. It was explained that, unlike the revocation, which terminated the validity of the certificate, the suspension was a temporary measure that only withheld the validity of the certificate for a certain period.

134. Support was expressed for introducing the notion of suspension of a certificate, as distinct from its outright revocation. However, it was suggested that such suspension should be dealt with in a separate provision, since the notion and effects of a suspension were different from those of a revocation.

135. After having considered the different views expressed, the Working Group agreed that the issue of revocation of certificates was an important part of an adequate legal regime of digital signatures and deserved further consideration by the Working Group. It was generally felt that additional elements were needed in a provision dealing with the subject, and the Secretariat was requested to prepare a revised provision taking into account the deliberations of the Working Group and including possible variants dealing with the time from which a revocation became effective. It was also agreed that the revised draft should contain provisions on the suspension of a certificate.

Paragraph (2)

136. It was suggested that the use of the word “obligation” in the first sentence of the paragraph was not
entirely appropriate and that it would be preferable in that context to use other words such as “onus” or “duty”.

137. The suggestion was made that, in addition to the holder of a certified key pair, the certification authority, too, should have the duty to revoke the corresponding certificate where the certification authority learned that the private cryptographic key had been lost, compromised or was in danger of being misused in other respects. In support of that suggestion it was stated that some international standards and guidelines on electronic certification and authentication, such as the Uniform International Authentication and Certification Practice Guidelines being prepared by the International Chamber of Commerce, contemplated such a duty.

138. In response to questions concerning a certification authority’s ability to fulfill such a duty, it was stated that the currently available technology allowed a certification authority to respond quickly in those situations. However, the time needed for such a response was not only a function of the technology available, but depended also on the level of service provided by a certification authority to its customers under the terms of their contractual arrangements (e.g. whether the certification authority had designated staff to deal with loss, compromise or misuse of private keys; whether the certification authority offered customer services during weekends or only during ordinary office hours).

139. The Working Group took note of the views expressed and agreed that they should be taken into consideration in its future deliberations on the issue of revocation of certificates.

7. Register of certificates

140. The Working Group based its discussion on register of certificates on the following draft provision:

“Draft article G

“(1) An authorized certification authority shall keep a publicly accessible electronic register of certificates issued, indicating when the individual certificate was issued, when it expires or when it was suspended or revoked.

“(2) The register shall be maintained by the certification authority for at least [10] years after the date of revocation or expiry of the operational period of any certificate issued by that certification authority.”

141. The Working Group was invited to begin its discussion on register of certificates by considering the importance of including a provision on that issue in the draft uniform rules and, in the event of a positive answer to that question, by considering the elements of such register and the retention period, if any, that should be provided.

142. While no objections of principle were raised to including a provision on register of certificates, it was suggested that the Working Group should keep under consideration the question whether such a provision was in fact necessary in the context of the draft uniform rules or was relevant for all the different types of certificates that might be issued by certification authorities.

143. With respect to the manner in which such a register should be structured, the view was expressed that, instead of maintaining each its own register of certificates, certification authorities belonging to the same public-key infrastructure might benefit from maintaining a centralized registry in which they would lodge the certificates they issued. Such a structure, which would aim at avoiding multiple registries, was currently being considered in some countries. It was suggested that it might be useful for the Working Group to examine that possibility further.

144. As regards paragraph (1), it was suggested that it was not necessary to indicate the date of issuance of a certificate in the register and that, accordingly, the words “indicating when the individual certificate was issued” should be deleted. Another suggestion was that certification authorities should maintain a separate database of revocation of certificates in order to facilitate inquiries by interested parties concerning the validity of certificates.

145. Differing views were expressed as to the need for, and adequacy of, the retention period referred to in paragraph (2). It was stated that providing a minimum retention period was relevant for the purpose of ensuring the availability of data to interested parties, a measure which was of particular importance within the context of time-limits existing under national laws for exercising or enforcing rights or demanding the performance of obligations. However, national laws had different time-limits for different types of rights and obligations. Similarly, they provided different retention periods for public and private records according to their respective objects. In the circumstances, it might be preferable to leave it for national law to determine what would be an appropriate retention period, rather than arbitrarily establishing a period that might not be adequate in all circumstances. Furthermore, the Working Group should bear in mind the cost entailed in maintaining a register of certificates over any given period of time. Depending on the level of service provided by the certification authority and the method used for filing certificates, it might not be cost-effective for a certification authority to undertake to retain some types of certificates beyond a certain period of time. It would not be advisable to attempt to provide a general retention period without information on the practical implications of such a rule for the industry.

146. Another view, however, was that the question of the retention period of records and information that allowed an interested party to establish the identity of its trade partners and the authenticity of their signatures involved a number of public-policy considerations that should not be ignored by the Working Group. That question deserved to be addressed in the draft uniform rules. As to the appropriate retention period it was suggested that certification authorities should not be free to stipulate unilaterally the retention period solely on the basis of their cost considerations. Furthermore, the cost of retention alone should not be a determinant factor for shortening or suppressing the retention period. Certifica-
tion authorities that filed the certificates they issued with the same registry within a public-key infrastructure could establish some mechanism for sharing the cost among themselves.

147. A suggestion was made to the effect that interested parties making inquiries in a register of certificates should be required to leave in it a trace giving some evidence that such an inquiry had been made. It was explained that the existence of such evidence might be of importance in the event that questions arose between the certification authority and such interested party as to whether the interested party had verified the validity of a certificate prior to relying on a digitally-signed message.

148. The Working Group took note of the different views expressed and requested the Secretariat to review the issues raised and formulate alternative draft provisions reflecting the debate that took place within the Working Group.

8. Relations between users and the certification authority

149. The Working Group had before it the following draft provision:

"Draft article J"

“(1) A certification authority is only allowed to request such information as is necessary to identify the user.

“(2) Upon request from legal or natural persons, the certification authority shall deliver information about the following:

“(a) the conditions under which the certificate may be used;

“(b) the conditions associated with the use of digital signatures;

“(c) the costs of using the services of the certification authority;

“(d) the policy or practices of the certification authority with respect to the use, storage and communication of personal information;

“(e) the technical requirements of the certification authority with respect to the user’s communication equipment;

“(f) the conditions under which warnings are given to users by the certification authority in case of irregularities or faults in the functioning of the communication equipment;

“(g) any limitation of the liability of the certification authority;

“(h) any restrictions imposed by the certification authority on the use of the certificate;

“(i) the conditions under which the user is entitled to place restrictions on the use of the certificate.

“(3) The information listed in paragraph (1) shall be delivered to the user before a final agreement of certifica-

III. INCORPORATION BY REFERENCE

151. Having completed its preliminary consideration of the legal issues and possible provisions to be considered in uniform rules on digital signatures, as reflected in part II of the present report, the Working Group noted that, for lack of sufficient time, it could not enter into any detailed discussion of the issues of incorporation by reference at the current session.

152. The Working Group recalled that the issue of incorporation by reference had been briefly discussed at various stages during the preparation of the Model Law (see A/CN.9/406, paras. 90 and 178, and A/CN.9/407, paras. 100-105 and 117). At its previous session, the Working Group was generally agreed that work was needed with respect to incorporation by reference in the context of electronic commerce. The view was expressed that, in any attempt to establish legal norms for such incorporation of reference clauses in data messages, the following three conditions should be met: (a) the reference clause should be inserted in the data message; (b) the document being referred to, e.g. general terms and conditions, had actually to be known to the party against whom the reference document might be relied upon; and (c) the reference document had to be accepted, in addition to being known, by that party. It was generally agreed that the topic of incorporation by reference would appropriately be dealt with in the context of general work on the issues of registries and service providers (A/CN.9/421, para. 114). The Commission, at its twenty-ninth session, was generally agreed that the issue could be dealt with in the context of work on certification authorities.

153. At the current session, there was general agreement that the acceptability of incorporation by reference was of considerable importance for the development of electronic commerce in general. While that issue might need to be discussed in the context of work on digital signa-

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2Ibid., para. 222.
tures and certification authorities, it would also deserve consideration at a more general level. Even if it was later found appropriate to devise specific rules for incorporation by reference in the context of digital signatures, a general discussion and possibly a general set of rules were needed.

154. The view was expressed that devising rules for incorporation by reference in an electronic environment might be a difficult task, in view of the complexity of the issues involved. Incorporation by reference and related issues, such as adhesion contracts and "battle-of-forms" issues, had given rise to a wide variety of legal rules in a paper-based environment, and not all the related legal issues had been solved satisfactorily. The topic made it necessary to balance conflicting interests. On the one hand, there existed a need to recognize party autonomy. On the other hand, possible abuses of adhesion contracts should be limited. In view of the difficulties expected to be met in the area of incorporation by reference, it was suggested that higher priority should be given to other issues that might also warrant further work in the context of electronic commerce. Another view was that a discussion of incorporation by reference could only be engaged on the basis of further studies by the Secretariat with respect to the comparative law aspects of adhesion contracts, battle-of-forms and related liability issues.

155. The widely prevailing view was that no further study by the Secretariat was needed, since the fundamental issues were well known and it was clear that many aspects of battle-of-forms and adhesion contracts would need to be left to applicable national laws for reasons involving, for example, consumer protection and other public-policy considerations. After discussion, the Working Group decided that the issue should be dealt with as the first substantive item on its agenda, at the beginning of its next session.

IV. FUTURE WORK

156. The Working Group recalled that it had been requested by the Commission to examine the desirability and feasibility of preparing uniform rules on issues of digital signatures and certification authorities. At the close of its session, the Working Group felt that its report to the Commission should indicate that it had reached consensus as to the importance of, and the need for, working towards harmonization of law in that area. While it had not made a firm decision as to the form and content of such work, it had come to the preliminary conclusion that it was feasible to undertake the preparation of draft uniform rules on issues of digital signatures.

157. In the context of the discussion of future work, it was recalled that, alongside digital signatures and certification authorities, future work in the area of electronic commerce might also need to address: issues of technical alternatives to public-key cryptography; general issues of functions performed by third-party service providers; and electronic contracting.1


(A/CONF.9/WG. IV/WP.71) [Original: English]

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1Ibid., paras. 219-221.
INTRODUCTION

1. Upon adoption of the UNCITRAL Model Law on Electronic Commerce, the Commission, at its twenty-ninth session, proceeded with a discussion of future work in the field of electronic commerce, based on a preliminary debate held by the Working Group on Electronic Data Interchange at its thirtieth session (A/CN.9/421, paras. 109-119). It was generally agreed that UNCITRAL should continue its work on the preparation of legal standards that could bring predictability to electronic commerce, thereby enhancing trade in all regions.

2. New proposals were made as to possible topics and priorities for future work. One proposal was that the Commission should start preparing rules on digital signatures. It was stated that the establishment of digital signature laws, together with laws recognizing the actions of “certifying authorities” (hereinafter referred to as “certification authorities”), or other persons authorized to issue electronic certificates or other forms of assurances as to the origin and attribution of messages “signed” digitally, was regarded in many countries as essential for the development of electronic commerce. It was pointed out that the ability to rely on digital signatures would be a key to the growth of contracting as well as the transferability of rights to goods or other interests through electronic media. In a number of jurisdictions, new laws governing digital signatures were currently being prepared. It was reported that such law development was already non-uniform. Should the Commission decide to undertake work in that area, it would have an opportunity to harmonize the new laws, or at least to establish common principles in the field of electronic signatures, and thus to provide an international infrastructure for such commercial activity.

3. Considerable support was expressed in favour of the proposal. It was generally felt, however, that, should the Commission decide to undertake work in the field of digital signatures through its Working Group on Electronic Data Interchange, it should give the Working
Group a precise mandate. It was also felt that, since it was impossible for UNCITRAL to embark on the preparation of technical standards, care should be taken that it would not become involved in the technical issues of digital signatures. It was recalled that the Working Group, at its thirtieth session, had recognized that work with respect to certification authorities might be needed, and that such work would probably need to be carried out in the context of registries and service providers. However, the Working Group had also felt that it should not embark on any technical consideration regarding the appropriateness of using any given standard (A/CN.9/421, para. 111). A concern was expressed that work on digital signatures might go beyond the sphere of trade law and also involve general issues of civil or administrative law. It was stated in response that the same was true of the provisions of the Model Law and that the Commission should not shy away from preparing useful rules for the reason that such rules might also be useful beyond the sphere of commercial relationships.

4. Another proposal, based on the preliminary debate held by the Working Group, was that future work should focus on service providers. The following were mentioned as possible issues to be considered with respect to service providers: the minimum standards for performance in the absence of party agreement; the scope of assumption of risk by the end parties; the effect of such rules or agreements on third parties; allocation of the risks of interlopers' or other unauthorized actions; and the extent of mandatory warranties, if any, or other obligations when providing value-added services (see A/Supp.1997/17, para. 116).

5. It was widely felt that it would be appropriate for UNCITRAL to examine the relationship between service providers, users and third parties. It was said that it would be very important to direct such an effort towards the development of international norms and standards for commercial conduct in the field, with the intent of supporting trade through electronic media, and not have as a goal the establishment of a regulatory regime for service providers, or other rules which could create costs unacceptable for market applications of EDI (see A/Supp.1997/17, para. 117). It was also felt, however, that the subject-matter of service providers might be too broad and cover too many different factual situations to be treated as a single work item. It was generally agreed that issues pertaining to service providers could appropriately be dealt with in the context of each new area of work addressed by the Working Group.

6. Yet another proposal was that the Commission should begin work on the preparation of the new general rules that were needed to clarify how traditional contract functions could be performed through electronic commerce. Uncertainties were said to abound as to what "performance", "delivery" and other terms meant in the context of electronic commerce, where offers and acceptances and product delivery could take place on open computer networks across the world. The rapid growth of computer-based commerce as well as transactions over the Internet and other systems had made that a priority topic. It was suggested that a study by the Secretariat could clarify the scope of such work. Should the Commission, after examination of the study, decide to pursue this task, one option would be to place such rules in the "Special provisions" section of the UNCITRAL Model Law on Electronic Commerce.

7. A further proposal was that the Commission should focus its attention on the issue of incorporation by reference. It was recalled that the Working Group had agreed that that topic would appropriately be dealt with in the context of more general work on the issues of registries and service providers (A/Supp.1997/17, para. 114). The Commission was generally agreed that the issue could be dealt with in the context of work on certification authorities.

8. After discussion, the Commission agreed that placing the issue of digital signatures and certification authorities on the agenda of the Commission was appropriate, provided that it was used as an opportunity to deal with the other topics suggested by the Working Group for future work. It was also agreed as to a more precise mandate for the Working Group that the uniform rules to be prepared should deal with such issues as: the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use of certification techniques; the specific issues of certification through the use of registries; and incorporation by reference.

9. The Commission requested the Secretariat to prepare a background study of the issues of digital signatures and service providers, based on an analysis of laws currently being prepared in various countries. On the basis of that study, the Working Group should examine the desirability and feasibility of preparing uniform rules on the above-mentioned topics. It was agreed that work to be carried out by the Working Group at its thirty-first session could involve the preparation of draft rules on certain aspects of the above-mentioned topics. The Working Group was requested to provide the Commission with sufficient elements for an informed decision to be made as to the scope of the uniform rules to be prepared. In view of the broad scope of activities covered by the UNCITRAL Model Law on Electronic Commerce and by possible future work in the area of electronic commerce, it was decided that the Working Group on Electronic Data Interchange would be renamed "Working Group on Electronic Commerce".

10. This note contains a preliminary study of the issues of digital signatures and related issues. It was prepared against the background of the UNCITRAL Model Law on Electronic Commerce, also taking into account the legislative texts recently adopted, or currently being prepared in a number of countries. Moreover, the study draws on the work of other organizations, in particular the draft Uniform International Authentication and Certification Practices being prepared by the International Chamber of Commerce (ICC) and the Digital Signature

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Guidelines published by the American Bar Association (ABA), and reflects the result of a meeting of an ad hoc group of experts, which brought together experts in the area of digital signatures and the Secretariat of UNCITRAL.

11. In line with the recent instructions relating to the stricter control and limitation of United Nations documents, the explanatory remarks to the draft provisions are as brief as possible. Additional explanations will be provided orally.

I. GENERAL REMARKS ON DIGITAL SIGNATURES

A. Functions of signatures

12. Article 7 of the UNCITRAL Model Law on Electronic Commerce is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the Model Law, the Working Group discussed the following functions traditionally performed by hand-written signatures: 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.

13. In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to the ease of intercepting and altering information in electronic form without detection, and the speed of processing multiple transactions. The purpose of various techniques currently available on the market or still under development is to offer the technical means by which some or all of the functions identified as characteristic of handwritten signatures or other kinds of authentication mechanisms used in a paper-based environment.

B. Digital signatures and other electronic signatures

14. In discussing the desirability and feasibility of preparing uniform legal rules for digital signatures, and with a view to assisting the Commission in its consideration of the scope of such possible uniform rules, the Working Group may wish to examine various techniques currently used or still under development, the purpose of which is to provide functional equivalents to handwritten signatures and other kinds of authentication mechanisms used in a paper-based environment.

1. Electronic signatures relying on techniques other than public-key cryptography

15. It may be recalled that, alongside "digital signatures" based on public-key cryptography, which constitute the main subject-matter of this note, there exist various other devices, often referred to as "electronic signature" mechanisms, which may currently be used, or considered for future use, with a view to fulfilling one or more of the above-mentioned functions of handwritten signatures. For example, certain techniques would rely on authentication through a biometrical device based on handwritten signatures. In such a device, the signer would sign manually,special pen, either on a computer screen or on a digital pad. The handwritten signature would then be analysed by the computer and stored as a set of numerical values, which could be appended to a data message and displayed by the recipient for authentication purposes. Such an authentication system would presuppose that samples of the handwritten signature have been previously analysed and stored by the biometrical device.

16. The Working Group may wish to discuss whether the scope of its work should be expanded to cover electronic signatures in general. Such work would require additional research by the Secretariat as to the technical and legal implications of using "signature" devices relying on techniques other than public-key cryptography. In view of the availability of sufficient preliminary information as to the legal implications of digital signatures, and of the existence of draft legislation on the topic in a number of countries, this note focuses on issues of digital signatures relying on public-key cryptography.

17. In discussing the desirability and feasibility of preparing uniform rules that would be applicable to both digital signatures and other forms of electronic signatures, the Working Group may wish to consider whether UNCITRAL should attempt to develop uniform rules at a level which would be intermediate between the high level of generality of the Model Law and more specific rules dealing with the particulars of one or more specific techniques. In any event, consistent with media neutrality in the Model Law, the uniform rules to be developed, should they focus on digital signatures, should not discourage the use of alternative methods.

2. Digital signatures relying on public-key cryptography

(a) Technical notions and terminology

18. Digital signatures are created and verified by using cryptography, the branch of applied mathematics that concerns itself with transforming messages into seemingly unintelligible form and back into the original form. Digital signatures use what is known as "public key cryptography." Numerous elements of the description of the functioning of a digital signature system in this section are based on the ABA Digital Signature Guidelines, pp. 8-17.
If many people need to verify the signer's digital signatures, the public key must be available or distributed to all of them, for example by publication in an on-line repository or any other form of public directory where it is easily accessible. Although the keys of the pair are mathematically related, if an asymmetric cryptosystem has been designed and implemented securely it is virtually infeasible to derive the private key from knowledge of the public key. The most common algorithms for encryption through the use of public and private keys are based on an important feature of large prime numbers: once they are multiplied together to produce a new number, it is virtually impossible to determine which two prime numbers created that new, larger number. Thus, although many people may know the public key of a given signer and use it to verify that signer's signatures, they cannot discover that signer's private key and use it to forge digital signatures.

22. It should be noted, however, that the concept of public-key cryptography does not necessarily imply the use of the above-mentioned algorithms based on prime numbers. Other mathematical techniques are currently used or under development, such as elliptic curve cryptosystems, which are often described as offering a high degree of security through the use of significantly reduced key-lengths. When discussing the issues of public-key cryptography, the Working Group may wish to recognize the extent to which public-key cryptography is being adopted in international trade. At the same time, the Working Group may wish to adopt a technically-neutral attitude, taking current technology into account without precluding future changes in the computing techniques by which key pairs are produced. Such openness to technical developments in the computer industry would, in addition, be consistent with the decision made by the Commission that it was impossible for UNCITRAL to embark on the preparation of technical standards, and that care should be taken that it would not become involved in the technical issues of digital signatures (see paragraph 3, above).

(ii) "Hash function"

23. In addition to the generation of key pairs, another fundamental process, generally referred to as a "hash function", is used in both creating and verifying a digital signature. A hash function is a mathematical process, based on an algorithm which creates a digital representation, or compressed form of the message, often referred to as a "message digest", or "fingerprint" of the message, in the form of a "hash value" or "hash result" of a standard length which is usually much smaller than the message but nevertheless substantially unique to it. Any change to the message invariably produces a different hash result.

3Certain existing standards such as the ABA Digital Signature Guidelines refer to the notion of "computational infeasibility" to describe the expected irreversibility of the process, i.e. the hope that it will be impossible to derive a user's secret private key from that user's public key. "Computationally infeasible" is a relative concept based on the value of the data protected, the computing overhead required to protect it, the length of time it needs to be protected, and the cost and time required to attack the data, with such factors assessed both currently and in the light of future technological advance" (ABA Digital Signature Guidelines, p. 9, note 23).
when the same hash function is used. In the case of a secure hash function, sometimes termed a "one-way hash function", it is virtually impossible to derive the original message from knowledge of its hash value. Hash functions therefore enable the software for creating digital signatures to operate on smaller and predictable amounts of data, while still providing robust evidentiary correlation to the original message content, thereby efficiently providing assurance that there has been no modification of the message since it was digitally signed.

(iv) "Digital signature"

24. To sign a document or any other item of information, the signer first delimits precisely the borders of what is to be signed. The delimited information to be signed may be referred to as the "message". Then a hash function in the signer's software computes a hash result unique (for all practical purposes) to the message. The signer's software then transforms the hash result into a digital signature using the signer's private key. The resulting digital signature is unique to both the message and the private key used to create it.

25. Typically, a digital signature (a digitally signed hash result of the message) is attached to its message and stored or transmitted with its message. However, it may also be sent or stored as a separate data element, so long as it maintains a reliable association with its message. Since a digital signature is unique to its message, it is useless if permanently disassociated from its message.

(v) Verification of digital signature

26. Digital signature verification is the process of checking the digital signature by reference to the original message and a given public key, thereby determining whether the digital signature was created for that same message using the private key that corresponds to the referenced public key. Verification of a digital signature is accomplished by computing a new hash result of the original message by means of the same hash function used to create the digital signature. Then, using the public key and the new hash result, the verifier checks whether the digital signature was created using the corresponding private key, and whether the newly computed hash result matches the original hash result which was transformed into the digital signature during the signing process.

27. The verification software will confirm the digital signature as "verified" if: (a) the signer's private key was used to sign digitally the message, which is known to be the case if the signer's public key was used to verify the signature because the signer's public key will verify only a digital signature created with the signer's private key; and (b) the message was unaltered, which is known to be the case if the hash result computed by the verifier is identical to the hash result extracted from the digital signature during the verification process.

(b) Public key infrastructure (PKI) and certification authorities

28. To verify a digital signature, the verifier must have access to the signer's public key and have assurance that it corresponds to the signer's private key. However, a public and private key pair has no intrinsic association with any person; it is simply a pair of numbers. An additional mechanism is necessary to associate reliably a particular person or entity to the key pair. If public key encryption is to serve its intended purposes, it needs to provide a way to send keys to a wide variety of persons, many of whom are not known to the sender, where no relationship of trust has developed between the parties. To that effect, the parties involved must have a high degree of confidence in the public and private keys being issued.

29. The requested level of confidence may be present between parties who trust each other, who have dealt with each other over a period of time, who communicate on closed systems, who operate within a closed group, or who are able to govern their dealings contractually, for example, in a trading partner agreement. In a transaction involving only two parties, each party can simply communicate (by a relatively secure channel such as a courier or a secure voice telephone) the public key of the key pair each party will use. However, the same level of confidence may not be present when the parties deal infrequently with each other, communicate over open systems (e.g. the World Wide Web on the Internet), are not in a closed group, or do not have trading partner agreements or other law governing their relationships.

30. In addition, because public key encryption is a highly mathematical technology, all users must have confidence in the skill, knowledge and security arrangements of the parties issuing the public and private keys.

31. A prospective signer might issue a public statement indicating that signatures verifiable by a given public key should be treated as originating from that signer. However, other parties might be unwilling to accept the statement, especially where there is no prior contract establishing the legal effect of that published statement with certainty. A party relying upon such an unsupported published statement in an open system would run a great risk of inadvertently trusting an imposter, or of having to disprove a false denial of a digital signature (an issue often referred to as "non-repudiation") if a transaction should turn out to prove disadvantageous for the purported signer.

32. A solution to these problems is the use of one or more trusted third parties to associate an identified signer or the signer's name with a specific public key. That trusted third party is generally referred to as a "certification authority" in most technical standards and guidelines. In a number of countries, such certification authorities are being organized hierarchically into what is often referred to as a public key infrastructure (PKI).

(i) Public key infrastructure (PKI)

33. Setting up a public key infrastructure (PKI) is a way to provide confidence that: (a) a user's public key has not
been tampered with and in fact corresponds to that user's private key; (b) the encryption techniques being used are sound; (c) the entities that issue the cryptographic keys can be trusted to retain or recreate the public and private keys that may be used for confidentiality encryption where the use of such a technique is authorized; (d) different encryption systems are inter-operable. To provide the confidence described above, a PKI may offer a number of services, including the following: (a) managing cryptographic keys used for digital signatures; (b) certifying that a public key corresponds to a private key; (c) providing keys to end users; (d) deciding which users will have which privileges on the system; (e) publishing a secure directory of public keys or certificates; (f) managing personal tokens (e.g. smart cards) that can identify the user with unique personal identification information or can generate and store an individual's private keys; (g) checking the identification of end users, and providing them with services; (h) providing non-repudiation services; (i) providing time-stamping services; (j) managing encryption keys used for confidentiality encryption where the use of such a technique is authorized.

34. A public key infrastructure (PKI) is often based on various hierarchical levels of authority. For example, models considered in certain countries for the establishment of possible PKIs include references to the following levels: (a) a unique "root authority", which would certify the technology and practices of all parties authorized to issue cryptographic key pairs or certificates in connection with the use of such key pairs, and would register subordinate certification authorities; (b) various certification authorities, placed below the "root" authority, which would certify that a user's public key actually corresponds to that user's private key (i.e. has not been tampered with); and (c) various local registration authorities, placed below the certification authorities, and receiving requests from users for cryptographic key pairs or for certificates in connection with the use of such key pairs, requiring proof of identification and checking identities of potential users. In certain countries, it is envisaged that notaries public might act as, or support, local registration authorities.

35. The Working Group may wish to have a general discussion of the issues of PKI. However, it is submitted that such issues may not lend themselves easily to international harmonization. The organization of a PKI may involve various technical issues, as well as issues of public policy that may better be left to each individual State. In that connection, decisions may need to be made by each State considering the establishment of a PKI, for example as to: (a) the form and number of levels of authority which should be comprised in a PKI; (b) whether only certain authorities belonging to the PKI should be allowed to issue cryptographic key pairs or whether such key pairs might be issued by the users themselves; (c) whether the certification authorities certifying the validity of cryptographic key pairs should be public entities or whether private entities might act as certification authorities; (d) whether the process of allowing a given entity to act as a certification authority should take the form of an express authorization, or "licensing", by the State, or whether other methods should be used to control the quality of certification authorities if they were allowed to operate in the absence of a specific authorization; (e) the extent to which the use of cryptography should be authorized for confidentiality purposes; and (f) whether Government authorities should retain access to encrypted information, through a mechanism of "key escrow" or otherwise. The Working Group may wish to recommend that the above-mentioned issues should not be addressed in the future work of the Commission with respect to digital signatures.

(ii) Certification authorities

36. To associate a key pair with a prospective signer, a certification authority issues a certificate, an electronic record which lists a public key together with the name of the certificate subscriber as the "subject" of the certificate, and may confirm that the prospective signer identified in the certificate holds the corresponding private key. A certificate's principal function is to bind a public key with a particular holder. A "recipient" of the certificate desiring to rely upon a digital signature created by the holder named in the certificate can use the public key listed in the certificate to verify that the digital signature was created with the corresponding private key. If such verification is successful, assurance is provided that the digital signature was created by the holder of the public key named in the certificate, and that the corresponding message had not been modified since it was digitally signed.

37. To assure the authenticity of the certificate with respect to both its contents and its source, the certification authority digitally signs it. The issuing certification authority's digital signature on the certificate can be verified by using the public key of the certification authority listed in another certificate by another certification authority (which may but need not be on a higher level in a hierarchy), and that other certificate can in turn be authenticated by the public key listed in yet another certificate, and so on, until the person relying on the digital signature is adequately assured of its genuineness. In each case, the issuing certification authority must digitally sign its own certificate during the operational period of the other certificate used to verify the certification authority's digital signature.

38. A digital signature corresponding to a message, whether created by the holder of a key pair to authenticate a message or by a certification authority to authenticate its certificate, should generally be reliably time-stamped to allow the verifier to determine reliably whether the digital signature was created during the "operational period" stated in the certificate, which is a condition of the verifiability of a digital signature.

39. To make a public key and its correspondence to a specific holder readily available for use in verification,
the certificate may be published in a repository or made available by other means. Typically, repositories are on-line databases of certificates and other information available for retrieval and use in verifying digital signatures. Depending upon the implementation, retrieval of a certificate can be accomplished automatically by having the verification program directly inquire of the repository to obtain certificates as needed.

40. Once issued, a certificate may prove to be unreliable, such as in situations where the holder misrepresents its identity to the certification authority. In other circumstances, a certificate may be reliable enough when issued but it may become unreliable sometime thereafter. If the private key is "compromised", for example through loss of control of the private key by its holder, the certificate may lose its trustworthiness or become unreliable, and the certification authority (at the holder's request or even without the holder's consent, depending on the circumstances) may suspend (temporarily interrupt the operational period) or revoke (permanently invalidate) the certificate. Immediately upon suspending or revoking a certificate, the certification authority must generally publish notice of the revocation or suspension or notify persons who enquire or who are known to have received a digital signature verifiable by reference to the unreliable certificate.

41. Certification authorities can conceivably be operated by Government authorities or by private sector service providers. In a number of countries, it is envisaged that, for public policy reasons, only Government entities should be authorized to operate as certification authorities. In other countries, it is considered that certification services should be open to competition from the private sector. Irrespective of whether certification authorities are operated by public entities or by private sector service providers, and of whether certification authorities would need to obtain a license to operate, there is typically more than one certification authority operating within the PKI. Of particular concern is the relationship between the various certification authorities. Certification authorities within a PKI can be established in a hierarchical structure, where some certification authorities only certify other certification authorities, which provide services directly to users. In such a structure, certification authorities are subordinate to other certification authorities. In other conceivable structures, some certification authorities may operate on an equal footing with other certification authorities. In any large PKI, there would likely be both subordinate and superior certification authorities. In any event, in the absence of an international PKI, a number of concerns may arise with respect to the recognition of certificates by certification authorities in foreign countries. The recognition of foreign certificates is often referred to as "cross certification". In such a case, it is necessary that substantially equivalent certification authorities (or certification authorities willing to assume certain risks with regard to the certificates issued by other certification authorities) recognize the services provided by each other, so their respective users can communicate with each other more efficiently and with greater confidence in the trustworthiness of the certificates being issued.

42. Legal issues may arise with regard to cross-certifying or chaining of certificates when there are multiple security policies involved. Examples of such issues may include determining whose misconduct caused a loss, and upon whose representations the user relied. It should be noted that legal rules considered for adoption in certain countries provide that, where the levels of security and policies are made known to the users, and there is no negligence on the part of certification authorities, there should be no liability.

43. It may be incumbent upon the certification authority or the root authority to ensure that its policy requirements are met on an ongoing basis. While the selection of certification authorities may be based on a number of factors, including the strength of the public key being used and the identity of the user, the trustworthiness of any certification authority may also depend on its enforcement of certificate-issuing standards and the reliability of its evaluation of data received from users who request certificates. Of particular importance is the liability regime applying to any certification authority with respect to its compliance with the policy and security requirements of the root authority or superior certification authority, or with any other applicable requirement, on an ongoing basis.

44. The Working Group may wish to consider the following factors, to be taken into account when assessing the trustworthiness of a certification authority: (a) independence (i.e. absence of financial or other interest in underlying transactions); (b) financial resources and financial ability to bear the risk of being held liable for loss; (c) expertise in public-key technology and familiarity with proper security procedures; (d) longevity (certification authorities may be required to produce evidence of certification or decryption keys many years after the underlying transaction has been completed, in the context of a lawsuit or property claim); (e) approval of hardware and software; (f) maintenance of an audit trail and audit by an independent entity; (g) existence of a contingency plan (e.g., "disaster recovery" software or key escrow); (h) personnel selection and management; (i) protection arrangements for the certification authority's own private key; (j) internal security; (k) arrangements for termination of operations, including notice to users; (l) warranties and representations (given or excluded); (m) limitation of liability; (n) insurance; (o) inter-operability with other certification authorities; (p) revocation procedures (in cases where cryptographic keys might be lost or compromised)

(c) Summary of the digital signature process

45. The use of digital signatures usually involves the following processes, performed either by the signer or by the receiver of the digitally signed message:

(a) The user generates or is given a unique cryptographic key pair;
(b) The sender prepares a message (for example, in the form of an electronic mail message) on a computer;
(c) The sender prepares a "message digest", using a secure hash algorithm. Digital signature creation uses a hash result derived from and unique to both the signed message and a given private key. For the hash result to be
secure, there must be only a negligible possibility that the same digital signature could be created by the combination of any other message or private key;

(d) The sender encrypts the message digest with the private key. The private key is applied to the message digest text using a mathematical algorithm. The digital signature consists of the encrypted message digest;

(e) The sender typically attaches or appends its digital signature to the message;

(f) The sender sends the digital signature and the (unencrypted or encrypted) message to the recipient electronically;

(g) The recipient uses the sender’s public key to verify the sender’s digital signature. Verification using the sender’s public key proves that the message came exclusively from the sender;

(h) The recipient also creates a “message digest” of the message, using the same secure hash algorithm;

(i) The recipient compares the two message digests. If they are the same, then the recipient knows that the message has not been altered after it was signed. Even if one bit in the message has been altered after the message has been digitally signed, the message digest created by the recipient will be different from the message digest created by the sender;

(j) The recipient obtains a certificate from the certification authority (or via the originator of the message), which confirms the digital signature on the sender’s message. The certification authority is typically a trusted third party which administers certification in the digital signature system. The certificate contains the public key and name of the sender (and possibly additional information), digitally signed by the certification authority.

II. LEGAL ISSUES AND POSSIBLE PROVISIONS TO BE CONSIDERED IN UNIFORM RULES ON DIGITAL SIGNATURES

A. Scope of work

46. In deciding to place the issue of digital signatures and certification authorities on its agenda, the Commission, at its twenty-ninth session, also agreed that the issue should be used as an opportunity to deal with the other topics suggested by the Working Group for future work (see paragraph 8, above). Prior to entering into a discussion of the issues of digital signatures, the Working Group may wish to discuss the desirability and feasibility of limiting the scope of its work to digital signatures or of extending it to cover also other authentication mechanisms that might be currently available or soon to be developed for use in electronic commerce (see paragraphs 15-17, above). It may be recalled that, during the preparation of the Model Law, the Working Group was mindful of the need to establish legal rules that would not be tied to a given stage of technical and commercial development but would rather provide general principles that could be expected to remain applicable through a number of years, irrespective of possible changes in technology. 47. The widespread use of digital signatures and the risk that diverging legislative approaches be taken in various countries with respect to digital signatures suggest that uniform legislative provisions are needed as a specific legal framework for that authentication technique. However, consistent with the media-neutral approach adopted in the preparation of the Model Law, the Working Group may wish to discuss whether it is appropriate to embark on the preparation of uniform rules that would apply to digital signatures only or whether such uniform rules should also be prepared with respect to other authentication techniques. Should the Working Group come to the conclusion that the above-mentioned risk that diverging laws be enacted in various countries suggests that the need for uniform rules applicable to digital signatures is particularly pressing, the Working Group may also wish to discuss the ways in which uniform rules on digital signatures might be drafted to avoid the risk that such uniform rules might be misinterpreted as encouraging the use of digital signatures to the detriment of competing techniques, which might also be regarded as acceptable illustrations of the concept of “reliable method” embodied in article 7 of the Model Law.

48. With respect to certification authorities, the Working Group may also wish to take into consideration that, in many practical situations, the activities of a commercial entity as a certification authority are but one aspect of a broader range of activities of that commercial entity as a service provider. The Working Group may thus wish to discuss whether uniform rules on certification authorities should be limited in scope to establishing rules of conduct applicable only in the context of the activities of a service provider acting as a certification authority or whether it would be desirable and feasible to develop rules applicable to a wider range of activities of service providers or “trusted third parties” in electronic commerce.

B. Sphere of application of uniform rules on digital signatures and general provisions

49. This note was prepared on the assumption that possible rules on digital signatures should be directly derived from article 7 of the Model Law and should be considered as a way to provide detailed information as to the concept of a reliable “method used to identify” a person and “to indicate that person’s approval” of the information contained in a data message. In considering general provisions for possible inclusion in a set of uniform rules on digital signatures, the Working Group may wish to consider more generally the relationship between such uniform rules and the UNCITRAL Model Law on Electronic Commerce. In particular, the Working Group might wish to make proposals to the Commission as to whether uniform rules on digital signatures should constitute a separate legal instrument or whether they should be incorporated in an extended version of the Model Law, for example as a separate chapter to be included in part II of the Model Law.

50. Irrespective of whether uniform rules on digital signatures are prepared as a separate instrument or as an...
addition to the Model Law, it is submitted that the uniform rules will need to be based on provisions along the lines of articles 1 (Sphere of application), 2(a), (c) and (e) (Definitions of "data message", "originator" and "addressee"), 3 (Interpretation), 4 (Variation by agreement), 6 (Writing) and 7 (Signature) of the Model Law. While such provisions are not expressly reproduced in this note, it should be noted that the draft uniform rules on digital signatures have been prepared by the Secretariat based on the assumption that such provisions were part of the uniform rules. In that connection, it should also be noted that provisions along the lines of articles 2, 4, 6 and 7 of the Model Law are contained in digital signature legislation being prepared in certain countries, while the Model Law is also referred to in such texts as the ABA Digital Signature Guidelines.

51. In addition to the above-mentioned provisions, the Working Group may wish to consider whether a preamble to the uniform rules should clarify the purpose of the uniform rules, namely to promote the efficient utilization of digital communication by establishing a security framework and by giving written and digital messages equal status as regards their legal effect.

C. Specific legal issues and draft provisions on digital signatures

1. Definitions

52. Laws, regulations and guidelines already implemented or currently being prepared in the area of digital signatures and certification authorities vary considerably as to the number of definitions on which they rely. Depending on the legal tradition of the enacting State, the issues of digital signatures may be dealt with mostly by way of definitions or contain no definition at all.

53. Consistent with the approach taken in the preparation of the Model Law, the Working Group may wish to consider a limited number of definitions of essential notions, such as "digital signature", "certification authorities" and "certificates".

54. The Working Group may wish to use the following possible definitions as a basis for its deliberations.

(a) Digital signature

55. "Draft article A"

(1) A digital signature is a numerical value, which is affixed to a data message and which, using a known mathematical procedure associated with the originator's private cryptographic key, makes it possible to determine uniquely that this numerical value has been obtained with the originator's private cryptographic key.

(2) The mathematical procedures used for generating authorized digital signatures under [this Law][these Rules] are based on public-key encryption. When applied to a data message, those mathematical procedures operate a transformation of the message such that a person having the initial message and the originator's public cryptographic key can accurately determine

(a) whether the transformation was operated using the private cryptographic key that corresponds to the originator's private cryptographic key, and

(b) whether the initial message was altered after the transformation was made.

(3) A digital signature affixed to a data message is regarded as authorized if it can be verified in accordance with procedures laid down by a certification authority authorized under [this Law][these Rules].

(4) The [relevant authority in the Enacting State] shall lay down specific rules for the technical requirements to be met by digital signatures and the verification thereof.

Remarks

56. Consistent with the functional approach taken in the preparation of the Model Law, paragraphs (1) and (2) of the suggested provision focus on a brief description of the technical functions performed by public-key encryption. Paragraphs (3) and (4) reflect the principle that digital signatures are valid only if used in the context of a public-key infrastructure (PKI) implemented by public authorities.

(b) Authorized certification authorities

57. "Draft article B"

(1) The ... [the enacting State specifies the organ or authority competent for authorizing certification authorities] may grant authorization to certification authorities to act in pursuance of [this Law][these Rules]. Such authorization may be revoked.

(2) The ... [the enacting State specifies the organ or authority competent to promulgate regulations with respect to authorized certification authorities] may establish rules governing the terms under which such authorizations may be granted, and promulgate regulations for the operation of certification authorities.

(3) Authorized certification authorities may issue certificates in relation to the cryptographic keys of natural and legal persons.

(4) Authorized certification authorities may offer or facilitate registration and time stamping of the transmission and reception of data messages as well as other functions regarding communications secured by means of digital signatures.

(5) The ... [the enacting State specifies the organ or authority competent to lay down specific rules with respect to the functions to be performed by authorized certification authorities] may lay down more specific rules for the functions to be performed by authorized certification authorities in connection with the issuance of certificates to individual natural or legal persons.

Remarks

58. The Working Group may wish to discuss whether the uniform rules to be prepared should expressly men-
tion the criteria which should be taken into account when authorizing certification authorities to operate. It may be recalled that, in the context of the preparation of the Model Law, such criteria were left for inclusion in the Guide to Enactment.

(c) Certificates

59. "Draft article C"

The certificate issued by an authorized certification authority, in the form of a data message or otherwise, shall indicate at least:

(a) the user's name [and address or place of business];

(b) [the day and year of birth] [sufficient identification] of the user if the user is a natural person;

(c) if the user is a legal person, the name of the company and any relevant information for identifying that company;

(d) the name, address or place of business of the certification authority;

(e) the user's public cryptographic key;

(f) any necessary information indicating how verification of the user's public cryptographic key is available to the recipient of the digital signature given according to the certificate;

(g) the serial number of the certificate; and

(h) the [date of issuance and the date of expiry] [validity period] of the certificate.

Remarks

60. Draft legislation on digital signature being prepared in certain countries lists some or all of the elements mentioned in draft article C as minimum information which is required to be provided in any certificate issued by a certification authority. However, consistent with the decision made by the Working Group in the preparation of the Model Law not to become involved in issued of personal data protection, the Working Group may wish to consider that, in many countries, information regarding, for example, the date of birth of a person would be protected as personal data and specific rules might govern its disclosure by electronic means.

2. Signature by legal and natural persons

61. "Draft article D"

(1) Natural and legal persons may equally obtain certification of cryptographic public keys used exclusively for identification purposes.

(2) A legal person may identify a data message by affixing to that message the private cryptographic key certified for that legal person. The legal person shall only be regarded as [the originator] [having approved the sending] of the message if the message is also digitally signed by the a natural person authorized to act on behalf of that legal person.

Remarks

62. The above provision is intended to clarify the conditions under which digital signatures may be applied to bind legal persons. It relies on a distinction between the two functions performed by "signature" under article 7(1)(a) of the Model Law, namely, to identify the author of a message and to indicate that person's approval of the information contained in the message. While the two functions would normally be fulfilled through the use of a single key certified for a natural person, public keys certified for legal persons would merely be used to provide assurance as to the identity of the legal person as the sender of the message. The "digital signature" of a legal person would thus be of limited effect. Any approval of the message would require, in addition to the "digital signature" (i.e. identification) of the legal person, the digital signature of a natural person, which would both identify that person and indicate, on behalf of the legal person, the intent to approve the contents of the message.

63. While the draft provision contains a reference to "a natural person authorized to act on behalf" of a legal person, it is not intended to displace the domestic law of agency. The question as to whether the natural person did in fact and in law have the authority to act on behalf of the legal person is thus left to the appropriate legal rules outside the uniform rules.

3. Attribution of digitally signed data messages

64. "Draft article E"

(1) The originator of a data message on which the originator's digital signature is affixed is bound by the content of the message in the same manner as if the message had existed in a [manually] signed form in accordance with the law applicable to the content of the message.

(2) The addressee of a data message on which a digital signature is affixed is entitled to regard the data message as being that of the addressee, 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 the originator's public key to the data message as received and the application of the originator's public key revealed: that the received data message had been encrypted with the originator's private cryptographic key; and that the initial message had not been altered after being encrypted through the use of the originator's public cryptographic key;

(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 the originator's private cryptographic key.

(3) Paragraph (2) does not apply:

(a) as of the time when the addressee knew or should have known, had it sought information from the
authorized certification authority or otherwise exercised reasonable care, that the validity of the originator's public cryptographic key had expired, or that the certificate issued by the certification authority had been revoked or suspended;

or

(b) in a case within paragraph (2)(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."

Remarks

65. The Working Group may wish to discuss whether the issue of attribution of digitally signed messages might be dealt with simply by way of a reference to article 13 of the Model Law. Draft article E, which is modelled on article 13 of the Model Law, is intended to provide an illustration of the principles contained in article 13 in the context of digital signatures. It is based on the need to provide certainty as to the legal effect of digital signatures, which are currently regarded as a highly secure authentication procedure. The draft provision places a heavy burden on the originator of a message bearing that originator's digital signature. It may be recalled that, under article 2(c) of the Model Law, "originator" means any person by whom, or on whose behalf, the data message purports to have been sent. The draft provision illustrates the need for any user of a digital signature to protect its private key which, if applied to encrypt a message, will create an irrebuttable presumption that the message was that of the purported originator.

4. Revocation of certificates

66. "Draft article F"

(1) The holder of a certified key pair may revoke the corresponding certificate. The revocation is effective from the time when it is [registered][received] by the certification authority.

(2) The holder of a certified key pair is under an obligation to revoke the corresponding certificate where the holder learns that the private cryptographic key has been lost, compromised or is in danger of being misused in other respects. If the holder fails to revoke the certificate in such a situation, the holder is liable for any loss sustained by third parties having relied on the content of messages as a result of the holder's failure to undertake such revocation."

Remarks

67. The Working Group may wish to note that, should it be provided in the uniform rules on digital signatures that revocation of a certificate becomes effective at the time when it is received by the certification authority, paragraph (4) of draft article H (liability) might be deleted since there could be no basis for the liability of the certification authority for fault or negligence in the registration of the revocation.

5. Register of certificates

68. "Draft article G"

(1) An authorized certification authority shall keep a publicly accessible electronic register of certificates issued, indicating when the individual certificate was issued, when it expires or when it was suspended or revoked.

(2) The register shall be maintained by the certification authority for at least [10] years after the date of revocation or expiry of the operational period of any certificate issued by that certification authority."

Remarks

69. The Working Group may wish to discuss whether a register of certificates should be publicly accessible or whether access to such a register might somehow need to be limited to interested parties. As to the time during which such a register should be maintained, the Working Group may wish to discuss whether any fixed period of time should be provided as a uniform rule, whether determination of that period should be left to the discretion of enacting States, or whether it should attempt to provide a more flexible criterion, e.g. by indicating that the register should be accessible to verify certificates during the operational period of each certificate and until the end of the period of time during which messages digitally signed under the certification authority's certificates would be used or need to be verified, which might make it necessary to provide several time periods, depending on existing laws on limitation and prescription.

6. Liability

70. "Draft article H"

(1) An authorized certification authority shall be liable to any person who has acted in good faith in reliance on a certificate issued by the certification authority for any loss due to defects in the registration of the certification authority, technical breakdowns or similar circumstances [even if the loss is not due][if the loss is due] to negligence by the certification authority.

(2) Variant X The liability for any individual loss shall not exceed [amount]. The ... [the enacting State specifies the organ or authority competent to revise the maximum amount] may regulate this amount every second year to reflect price developments

Variant Y The ... [the enacting State specifies the organ or authority competent to promulgate liability regulations] may promulgate regulations on the liability of certification authorities

(3) In case the party who has sustained the loss has contributed to this wilfully or negligently, the compensation may be reduced or may not be granted.

(4) Where an authorized certification authority has received notice of revocation of a certificate, the
authority shall register such revocation forthwith. If the authority fails to do so, it shall be liable for any resulting loss sustained by the user.]

Remarks

71. The Working Group may wish to discuss whether a provision on liability should expand to cover cases beyond negligence by the certification authority. The Working Group may also wish to determine whether and to what extent party autonomy should apply to allow certification authorities to control, by private agreement with the users, the extent to which they should be liable.

72. The Working Group may wish to consider including a "safe-harbour" provision along the following lines:

"A certification authority that complies with [this Law] and any applicable law or contract is not liable for any loss which (1) is incurred by the holder of a certificate issued by that certification authority as a result of the holder's reliance on that certificate, or (2) is caused by reliance upon a certificate issued by that certification authority, upon a digital signature verifiable through reference to a public key listed in a certificate issued by that certification authority, or upon information represented in such a certificate."

7. Issues of cross-certification

73. "Draft article I"

(1) Certificates issued by foreign certification authorities may be used for digital signatures on the same terms as digital signatures subject to [this Law] if they are recognized by an authorized certification authority, and the authorized certification authority guarantees, to the same extent as its own certificates, the correctness of the details of the certificate as well as the certificate being valid and in force.

(2) The ... [the enacting State specifies the organ or authority competent to establish rules in connection with the approval of foreign certificates] is authorized to approve foreign certificates and to lay down specific rules for such approval.

Remarks

74. Draft article I is based on the notion that recognition of foreign certificates should be provided under the responsibility of a local certification authority on the basis of reciprocity. In discussing the issues of cross-certification, the Working Group may wish to consider whether full reciprocity should be required or whether guarantees as to the correctness and validity of foreign certificates might not necessarily be provided at the same level by all authorities that would form part of a cross-certification scheme. The Working Group may also wish to consider whether Government intervention should necessarily be required for recognition of foreign certificates.

75. As a possible alternative to draft article I, the Working Group may consider the approach taken in draft legislation in certain countries, under which recognition of foreign certificates could only be provided on the basis of bilateral or multilateral international agreements.

8. Relations between users and the certification authority

76. "Draft article J"

(1) A certification authority is only allowed to request such information as is necessary to identify the user.

(2) Upon request from legal or natural persons, the certification authority shall deliver information about the following:

(a) the conditions under which the certificate may be used;
(b) the conditions associated with the use of digital signatures;
(c) the costs of using the services of the certification authority;
(d) the policy or practices of the certification authority with respect to the use, storage and communication of personal information;
(e) the technical requirements of the certification authority with respect to the user's communication equipment;
(f) the conditions under which warnings are given to users by the certification authority in case of irregularities or faults in the functioning of the communication equipment;
(g) any limitation of the liability of the certification authority;
(h) any restrictions imposed by the certification authority on the use of the certificate;
(i) the conditions under which the user is entitled to place restrictions on the use of the certificate.

(2) The information listed in paragraph (1) shall be delivered to the user before a final agreement of certification is concluded. [That information may be delivered by the certification authority by way of a certification practice statement].

(3) Subject to a [one-month] notice, the user may terminate the agreement for connection to the certification authority. Such notice of termination takes effect when received by the certification authority.

(4) Subject to a [three-month] notice, the certification authority may terminate the agreement for connection to the certification authority. Such notice of termination takes effect when received.

III. INCORPORATION BY REFERENCE

A. Previous discussion

77. 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 Exchange (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 (ACN.9/406, paras. 90 and 178).

78. At its twenty-ninth session, 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 (ACN.9/WG.IV/ WP.65) and another submitted by the United Kingdom of Great Britain and Northern Ireland (ACN.9/WG.IV/ WP.66). The prevailing view 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". It was stated, in response, 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. An other 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. The Working Group agreed that the issue of incorporation by reference might need to be further considered in the context of future work (ACN.9/407, paras. 100-105 and 117).

79. At its thirtieth session, the Working Group was generally agreed that work with respect to incorporation by reference in the context of EDI was needed. The view was expressed that, in any attempt to establish legal norms for such incorporation of reference clauses in data messages, the following three conditions should be met: (a) the reference clause should be inserted in the data message; (b) the document being referred to, e.g. general terms and conditions, had actually to be known to the party against whom the reference document might be relied upon; and (c) the reference document had to be accepted, in addition to being known, by that party. It was generally agreed that the topic of incorporation by reference would appropriately be dealt with in the context of more general work on the issues of registries and service providers (ACN.9/421, para. 114). The Commission, at its twenty-ninth session, was generally agreed that the issue could be dealt with in the context of work on certification authorities.  

B. Possible need for uniform rules on incorporation by reference

80. Incorporation by reference is a concise means of referring generically in a document to provisions which are detailed elsewhere, rather than reproducing them in full. For example, it makes it unnecessary to set out lengthy standards terms when negotiating or concluding contracts. The terms may thus be read into the document or data message which refers to them, simply by the device of identifying the terms sufficiently and indicating an intention to include them. In an electronic environment, incorporation by reference may be defined as the method of making one data message or record (or part of the information contained therein) become a part of another separate data message or record by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter as if it were fully set out therein.

1. Traditional rules developed in a paper-based environment

(a) Incorporation by reference

81. The legal issues raised by incorporation by reference are known in the context of paper-based communications, and legal rules exist in many legal systems, establishing the legal conditions under which information which is not fully expressed in a written document may legally be regarded as part of that document. For example, under certain conditions, a reference to one or more INCOTERMS, such as "carriage paid to" (CPT) or "carriage and insurance paid to" (CIP), may be included in a purchase order or in an invoice, with the consequence that those INCOTERMS will be regarded as one of the terms of the corresponding sales contract without the actual definition of CPT or CIP sales being stated in full in any of the contractual documents. The incorporation by reference of the INCOTERMS may be facilitated by the fact that such terms were prepared by the International Chamber of Goods.
Commerce (ICC) specifically for inclusion into contracts through the use of their acronyms or abbreviated designations, which are widely known and recommended for use both by the ICC and by UNCITRAL. Another example of a text which is often incorporated by reference is the Uniform Customs and Practice for Documentary Credits (UCP 500) prepared by ICC. The legal reasoning used for allowing a text such as UCP 500 to be incorporated by reference into a contract would often be based on the recognition that such a text records widely known and accepted practice worldwide, and is presumed to be known by all parties involved.

82. Where no such presumption applies, the conditions set forth by national law for validating incorporation by reference may involve strict requirements, such as actual knowledge of the information incorporated by reference by all parties, or even express approval of that information by the party against whom enforcement is sought. Under certain national laws, however, the requirements for validating incorporation by reference are more lenient. For example, certain traditional legal tests of incorporation by reference may focus on the clarity of the clause by which incorporation by reference is effected and on the accessibility of the information incorporated by reference.

(b) “Battle of forms”

83. The issue of incorporation by reference is not to be confused with the issue generally known as the “battle of forms”. A battle of forms may occur where, for example, the general contracting terms and conditions proposed by a buyer are stated in small print on the back of its purchase order, while a different set of general contracting terms and conditions is stated on the back of the invoice issued by the seller. Where no specific agreement has been entered into by the buyer and the seller as to which terms and conditions will apply to a given contract, and two conflicting sets of terms and conditions have been communicated by the parties on the back of their contractual documents, there may be a need to solve the uncertainty as to which terms and conditions will govern the transaction. In many countries, legal rules of contract law have been developed for the purpose of solving that ambiguity.

2. Issues raised in an electronic commerce environment

(a) Widespread use of incorporation by reference

84. Incorporation by reference is essential to widespread use of electronic data interchange (EDI), electronic mail, digital certificates and other forms of electronic commerce. For example, communications by way of standard EDI messages, and electronic communications in general, are typically structured in such a way that large numbers of messages are exchanged, with each message containing brief information, and relying much more frequently than paper documents on reference to information accessible elsewhere. EDI and other highly structured and formatted types of data invariably make extensive use of incorporation by reference to enhance the efficiency of data processing. At previous sessions of the Working Group, it was stated that EDI and diverse forms of electronic commerce were fundamentally systems of incorporation by reference. As a practical matter, EDI messages are potentially less legally certain unless clarity is provided as to the validity and effectiveness of the incorporation by reference of the relevant legal, technical and administrative terms, conditions, clauses, agreements, standards, rules, or guidelines that may be applicable to those messages.

85. With respect to situations where a “battle of forms” would occur in a paper-based environment, it should be borne in mind that electronic messaging is not intended and not even equipped to transmit with each message texts such as general terms and conditions typically printed on the back of paper documents. The inclusion of all relevant terms and conditions would be expensive and inefficient. It would slow down and perhaps stall electronic communication, and might even reduce the effectiveness of notice by forcing relying parties to either print or scroll through such lengthy text. Developing rules as to how such texts might be regarded as incorporated into a message is thus necessary. The aim of such rules, if possible, should be to reduce in an electronic environment the difficulties that result from a battle of forms in a paper-based environment or, at least, to ensure that the solutions elaborated under many national laws to solve those difficulties in a paper-based environment would also be available in an electronic environment. It should be noted that developing such rules would not necessarily involve changing the solutions that may derive from existing national law as to how a “battle of forms” situation may be solved.

86. Standards for incorporating data messages by reference into other data messages may also be essential to the use of public key certificates, because these certificates are generally brief records with rigidly prescribed contents that are finite in size. The trusted third party which issues the certificate, however, is likely to require the inclusion of relevant terms limiting its liability. The scope, purpose and effect of a certificate in commercial practice, therefore, would be ambiguous and uncertain without external terms being incorporated by reference. This is the case especially in the context of international communications involving diverse parties who follow varied trade practices and customs.

87. It has been repeatedly stated at previous sessions of the Working Group that the establishment of standards for incorporating data messages by reference into other data messages was critical to the growth of a computer-based trade infrastructure. Without the legal certainty fostered by such standards, computer-based trade transactions would become burdened by the inclusion of large quantities of material, thereby becoming unwieldy for the parties involved as well as for the system facilitating the transaction. Without such uniform standards, there might be a significant risk that the application of traditional tests for determining the enforceability of terms that seek to be incorporated by reference might be ineffective when applied to corresponding electronic commerce terms.
because of the differences between traditional and electronic commerce mechanisms. For example, certain traditional legal tests of incorporation by reference may inquire 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. Specific rules may be needed because the methods used for giving notice and ensuring access to information may differ in a paper-based environment and in electronic commerce, with the possible consequence that, in some jurisdictions, traditional rules on incorporation by reference might lead to unjustified discrimination against electronic commerce.

(b) Accessibility of incorporated text

88. Electronic commerce relies heavily on the mechanism of incorporation by reference. At the same time, however, the accessibility of the full text of the information being referred to may be considerably improved by the use of electronic communications. For example, a message may have embedded in it uniform resource locators (URL), which direct the reader to the referenced document. Such URLs can provide "hypertext links" allowing the reader to simply direct a pointing device (such as a mouse) on a key word associated with a URL and the referenced text would appear.

89. The same methods may be used in an electronic environment for ensuring easy access of all users to a variety of texts, such as: (a) texts embodying established commercial practice (e.g. UCP 500); (b) technical standards governing the communication; (c) certification practice statements issued by certification authorities; and (d) more specific information such as a company's general contracting terms and conditions. The legal effect of these methods, however, cannot be confidently relied upon without standards for incorporating data messages by reference into other data messages.

90. The need for development of rules on incorporation by reference in an electronic environment results both from the frequency at which data messages refer to information recorded elsewhere and from the availability of the technical means that make verification of such information easier and quicker than in a paper-based environment.

C. Possible provisions

91. In developing possible provisions on incorporation by reference in electronic commerce, the Working Group may wish to bear in mind that, in certain jurisdictions, the existing rules developed for use in a paper-based environment are based on the concern that the terms or other information incorporated should be properly brought to the notice of the addressee, or a third party, as the case may be. Where such rules of law exist, it may be appropriate for them to apply irrespective of whether the incorporation by reference is made by means of EDI or by any other type of communication.

92. It would nevertheless seem possible to formulate a general principle clarifying that incorporation by reference is effective in electronic commerce, provided that it is also made clear that this principle does not affect any rules which may exist relating to: (a) the need for the content or location of the terms or other information to be brought to the attention of any party to whom they are to apply, or to be available to that party; or (b) any legal requirement that terms should be accepted before they can form part of a contract. The essential principle is that the use of incorporation by reference should be recognized, so that the fact that information is only set out elsewhere does not in itself prevent that information from being read into the data message in which it is referred to.

93. The Working Group may wish to resume its consideration of the issues of incorporation by reference on the basis of the two following variants:

Variant A

Unless otherwise agreed, when [adequately] [reasonably] accessible terms, conditions, clauses, agreements, standards, rules or guidelines are referenced in full or in part in a data message with the [apparent] intent to incorporate them as part of the content or otherwise to be legally binding, those terms shall be presumed to be incorporated by reference in that data message. Between the parties, 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.

Variant B

(1) This article applies where information recorded or communicated in a data message refers, or is only fully ascertainable by reference, to information recorded elsewhere ("the further information").

(2) Subject to paragraph (4), the data message shall have the same effect as if the further information were fully expressed in the data message, and ascertainable solely by reference thereto, if the data message:

(a) identifies the further information:

(i) by a collective name or description; and

(ii) by identifying the record, and the parts of that record, containing the further information, and, where that record is not publicly available, the place where it may be found; and

(b) expressly indicates or carries a clear implication that the data message should have the same effect as if the further information were fully expressed in the data message.

(3) Nothing in this article affects:

(a) any rule of law which requires adequate notice to be given of the content of the information recorded elsewhere, or of the record or place where such information may be found, or which requires that record or place to be accessible to another person; or

(b) any rule of law relating to the acceptance of an offer for the purpose of contract formation.
IV. PRIVATELY FINANCED INFRASTRUCTURE PROJECTS*

Draft chapters of a legislative guide on privately financed infrastructure projects: report of the Secretary-General
(A/CN.9/438 and Add. 1-3) [Original: English]

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*The Commission may wish henceforth to use the words "privately financed infrastructure projects" to refer to its work in this field, rather than the words "build-operate-transfer" (BOT), which had so far been used. Although sometimes used as a generic expression for different forms of private financing of public infrastructure projects, in its literal meaning BOT refers only to one particular type of infrastructure project with private funding. However, as the practice in this field continues to evolve, various different types of arrangements are developed which do not fall under the pure BOT category, such as "build-operate" (BOO), "build-operate-transfer" (BOOT), "build-lease-transfer" (BOLT) or "build-rent-transfer" (BRT), to name but a few. The proposed words are intended to make it clear that the Commission's work in this field covers all arrangements for the development of public infrastructure projects involving private financing, including, but not limited to, BOT arrangements.
INTRODUCTION

1. At its twenty-ninth session, in 1996, the Commission decided to prepare a legislative guide on build-operate-transfer (BOT) and related types of projects. The Commission reached its decision after consideration of a report prepared by the Secretary-General which contained information on work being undertaken by other organizations in that field, as well as an outline of issues covered by national laws concerning those arrangements (A/CN.9/424).

2. It was reported that, unlike publicly funded projects, in which the Government is responsible for the entire implementation of the project, including for obtaining financing and guaranteeing its repayment, in the case of privately financed infrastructure projects the Government engages a private entity to develop, maintain and operate an infrastructure facility in exchange for the right to charge a price, either to the public or to the Government, for the use of the facility or the services or goods it generates.

3. In its deliberations, the Commission noted the interest that BOT and other forms of private participation in public infrastructure projects had raised in many States, in particular in developing countries, as the successful implementation of such projects would enable States to achieve significant savings in public expenditure and to reallocate resources that otherwise would have been invested in infrastructure in order to meet more pressing social needs. Furthermore, since the project is built and, during the concession period, operated by the project company, the country benefits from private sector expertise in operating and managing the relevant infrastructure facility. The Government may expect in particular to achieve efficiency gains and high standards of service, which sometimes may not be provided by self-regulated State monopolies.

4. It was noted, however, that BOT and similar projects could be quite complex and that their implementation required a favourable legal framework that fostered the confidence of potential investors, national and foreign, while protecting public interests. Thus, the Commission considered that it would be useful to provide legislative guidance to States preparing or modernizing legislation relevant to those projects. Pursuant to a request by the Commission, the Secretariat has reviewed issues suitable for being dealt with in a legislative guide and has prepared draft materials for consideration by the Commission, which are submitted with this report.

5. The document contained in the annex to the present report contains a table of contents setting out the topics proposed to be covered by the legislative guide, which are followed by annotations in some detail concerning the issues suggested to be discussed therein. Those annotations are offered for the purpose of enabling the Commission to make an informed decision on the proposed structure of the legislative guide and its contents. In preparing that document, the Secretariat considered a number of issues which have often been addressed in national laws and regulations pertaining to privately financed infrastructure projects. However, it is not suggested that the legislative guide should recommend that all of those issues be dealt with at the legislative level, and it is proposed to consider in the legislative guide the desirability of dealing with some of them in legislation, while leaving others to be addressed by the parties in the agreements concerning the implementation of the project.

6. For the purpose of providing the Commission with a clear view of the style and level of detail envisaged for the legislative guide, the Secretariat has also prepared initial drafts of chapter I, “Scope, purpose and terminology of the Guide”, chapter II, “Parties and phases of privately financed infrastructure projects” and chapter V, “Preparatory measures” (A/CN.9/438/Add.1-3).

7. In preparing the draft materials, the Secretariat has borne in mind the need to keep the appropriate balance between the objective of attracting private investment for infrastructure projects and the protection of the interests of the host Government and the users of the infrastructure facility.

8. The Commission may wish to provide comments on the proposed structure of the legislative guide and guidance on the issues suggested to be discussed therein, so as to allow the Secretariat to prepare the remaining draft chapters of the legislative guide for the next session of the Commission, in 1998.
ANNEX

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

ANNOTATED TABLE OF CONTENTS

INTRODUCTION

A. Origin of the Guide
B. Arrangement of the Guide
C. Recommendations and illustrative provisions

Notes
1. As was the case of the introductions contained in the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works and in the UNCITRAL Legal Guide on International Countertrade Transactions, it is suggested that the Introduction explain the origin of the Guide, its arrangement and style, the nature of its recommendations and provide other information of a similar nature.

I. SCOPE, PURPOSE AND TERMINOLOGY

A. Transactions covered by the Guide
B. Purpose of the Guide
C. Terminology used in the Guide

Notes
2. It is suggested to provide, in the opening chapter of the Guide, information on the transactions it covers and on the purpose of the Guide, as well as an explanation of terms frequently used in the Guide.

3. An initial draft of chapter I is contained in document A/CN.9/438/Add.1.

II. PARTIES AND PHASES OF PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

A. General remarks
B. Private sector and public infrastructure
C. The concept of project finance
D. Parties to the project
1. The host Government
2. Project sponsors and project company
3. Lenders and international financial institutions
4. Other capital providers
5. Construction contractors and suppliers
6. Operation and maintenance company
7. Insurers
E. Phases of execution
1. Identification of the project
2. Selection of project sponsors

3. Preparations for the implementation of the project
4. Construction phase
5. Operational phase
6. Termination of the project

Notes
4. As an introduction to privately financed infrastructure projects, it is proposed that chapter II contain general remarks on the concept of project finance, the parties to a privately financed infrastructure project and the phases of its implementation. The purpose of chapter II is to provide the reader with background information and to facilitate making an informed choice of possible legislative solutions for the issues subsequently discussed in the Guide.

5. An initial draft of chapter II is contained in document A/CN.9/438/Add.2.

III. GENERAL LEGISLATIVE CONSIDERATIONS

A. Legal framework for privately financed infrastructure projects
1. Legislative authorization
2. Legislative approaches to infrastructure projects
B. Other relevant areas of legislation
1. General business laws and property law
2. Settlement of disputes
3. Investment and taxation laws
C. National legislation and international agreements
1. International investment protection agreements
2. International trade instruments

Notes
6. In the opening section of chapter III it is proposed to discuss two issues concerning the general legal framework for privately financed infrastructure projects, namely, the legislative authorization for the host Government to undertake such projects and the legal regime to which they are subject.

7. The implementation of privately financed infrastructure projects may require the enactment of legislation or the adoption of special regulations, particularly in those countries where the Government alone carries the responsibility for providing "public services", or for building or expanding infrastructure. In countries with a well-established tradition of awarding concessions to the private sector for the provision of "public services", or the development of "public works", there may be general rules providing that, in principle, any activity carried out by the State which has an economic value that makes it capable of being exploited by private undertakings may be entrusted to the private sector. Sometimes, such gen-
eral legislation identifies those fields of activity or types of infrastructure that may be provided or developed by private entities. A different approach is to be found in countries that do not have such general legislation and that have preferred to enact specific laws covering privately financed projects in particular fields of activity. In some countries, as a matter of legislative practice, it was considered appropriate to adopt specific legislation regulating the execution and operation of one or more individual projects. It is proposed to discuss the possible advantages and limitations of both general and project-specific or sector-specific legislation and the possibility of a combined approach of general and sector-specific legislation.

8. In adopting general or specific legislation, a number of States have found it desirable to issue some form of declaration of policy concerning private sector participation in public services and utilities, or an explanation concerning the objectives being pursued by the host Government. Declarations of policy may be useful means of reassuring potential sponsors, other equity investors and lenders of the governmental support to privately financed infrastructure projects in the host country. Also, a public manifestation by the host Government of its commitment to pursue a policy favourable to privately financed infrastructure projects may serve an educational purpose by informing the public about how it is expected that the governmental policy on privately financed public infrastructure projects would generate benefits to the country.

9. Another issue proposed to be discussed concerns the legal regime of privately financed infrastructure projects. In some countries, the relations between the project company and the host Government are regarded as being of a contractual nature, therefore placing both parties in a position of essential equality. In other countries, particularly in a number of civil law jurisdictions, privately financed infrastructure projects fall under well-defined categories and rules of a body of law often referred to as “administrative law” (see chapter I, “Scope, purpose and terminology of the Guide”). The practical consequences of those different approaches to the legal regime of the agreement between the project company and the host Government may be considerable.

B. Other areas of legislation relevant to privately financed infrastructure projects

10. In addition to issues pertaining to legislation immediately relevant for privately financed infrastructure projects, it is proposed to consider in a separate section the possible impact of other areas of legislation to the successful implementation of those projects.

11. The business laws of the host country play a very important role in facilitating the implementation of the project. A privately financed infrastructure project is often carried out by a company especially established by the project sponsors for that purpose. It is therefore important for the host Government to have an adequate company law with modern provisions on essential matters such as establishment procedures, management structure, issuance of shares, bonds and debentures and their sale or transfer, accounting and financial statements, protection of minority shareholders. Also, it is important that the national laws on commercial contracts and securities provide adequate solutions to the needs of the project company and the lenders, including the possibility of assigning receivables generated by the project and flexibility in devising contracts as needed for the construction and operation of the infrastructure facility. Routine transactions of the project company may be further facilitated by adequate commercial banking legislation.

Modern solutions for a number of relevant commercial law issues may be found in existing international legal instruments, including conventions and model laws that emanate from the work of UNCITRAL, such as the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Sale of Goods, the UNCITRAL Model Law on Independent Guarantees and Stand-By Letters of Credit, the UNCITRAL Model Law on Electronic Commerce.

12. It is also desirable that the property laws of the host country reflect modern acceptable standards and contain adequate provisions on the ownership and use of land and buildings, as well as movable property and intellectual property (copyrights, trademarks), ensuring the project company’s ability to purchase, sell, transfer and license the use of property, as appropriate. Particularly as regards the protection of intellectual property, a legal framework may be provided by adherence to international agreements regarding the protection and registration of international property rights.

13. Another important factor for the implementation of privately financed infrastructure projects is the legal framework in the host country for the settlement of disputes. Project sponsors, contractors and lenders may be encouraged to participate in projects in countries that provide a hospitable and internationally acceptable legal climate for the settlement of disputes, as offered by the UNCITRAL Model Law on International Commercial Arbitration. The efficiency of the national judicial system, the expeditiousness of court proceedings and the availability of forms of judicial relief that are adequate to commercial disputes are additional factors to be taken into account, as well as the possibility of recognition and enforcement of foreign arbitral awards.

C. National legislation and international agreements

14. In the last section of chapter III it is proposed to consider the possible relevance for the laws of the host country governing privately financed infrastructure projects of international agreements on the facilitation and promotion of global or regional trade in goods and services.

15. Those international agreements may contain provisions on the removal of barriers for the importation of goods or for the provision of services by foreigners in their contracting States. Provisions of that type may be relevant for national legislation on privately financed infrastructure projects which contemplate restrictions on the participation of foreign companies in infrastructure projects, or establish preferences for national entities, or for the procurement of supplies in the local market.

16. One matter of particular concern for the project sponsors and the lenders is the degree of protection afforded to foreign investment in the host country. Such protection may derive from international agreements entered into by the host country for the encouragement and protection of foreign investment. The confidence of foreign investors in the host country may be fostered, for example, by protection from nationalization or dispossessions without judicial review and adequate compensation. Prospective project sponsors will also be concerned about their ability to transfer abroad or repatriate their profits. Another way of attracting foreign investment may consist in providing special tax regimes for private investors, such as exemption from corporate tax or other taxes, exemption from income tax for foreign personnel required to staff the project, exemption from real estate tax, tax concession on royalties, import duties.
IV. SELECTION OF THE PROJECT SPONSORS

A. General remarks

B. Possible methods for selecting the project sponsors
1. Public tendering
2. Request for proposals
3. Direct negotiations
4. Unsolicited proposals

C. Qualification criteria
1. Requirements relating to the project sponsors
2. Domestic preferences

D. Selection process
1. Prequalification phase
2. Invitation and proposals
3. Evaluation and project award

Notes

A. General remarks

17. It is proposed that the opening section of chapter IV discuss general issues and possible approaches relevant for establishing an adequate legislative framework for the choice of methods and procedures for selecting the project sponsors. One important step is for the host Government to establish clearly the nature and scope of the works and services being procured. Also, the role envisaged for the private sector in any given case (for instance, whether the facility will be permanently or temporarily owned by the project company or whether it will be transferred to the host Government at the end of a certain period) might require special consideration by the host Government in devising qualification requirements and evaluation criteria. Furthermore, it is important to give appropriate weight to the long-term requirements of the operation of the facility which may be neglected if the law were to overemphasize the requirements of the construction phase for the purpose of selecting the project sponsors.

B. Possible methods for selecting the project sponsors

18. It is suggested that a section examine methods commonly used for the procurement of goods and services and consider their adequacy for infrastructure projects, particular attention being given to the UNCITRAL Model Law on Procurement of Goods, Construction and Services. Competitive methods are often referred to in national laws relating to privately financed public infrastructure projects as primary or sole methods for selecting the project sponsors. Public tendering is the most common method for public procurement of goods and, in some cases, also services to be paid with public funds. However, given the complex nature of infrastructure projects, alternative competitive methods, such as the "request for proposals" procedure, are sometimes preferred for the selection of the project sponsors.

19. In addition to competitive methods, other methods are sometimes referred to in national legislation, such as direct negotiations or, in the case of unsolicited proposals, single source procurement. Direct negotiations are sometimes allowed under exceptional circumstances, such as when for special reasons competitive methods would not lead to satisfactory results, or in the case of projects with an anticipated initial investment value not exceeding a certain amount or of a limited duration.

20. Another issue which is sometimes dealt with in national legislation on privately financed infrastructure projects concerns unsolicited proposals. Some laws refer to general criteria for the admissibility and negotiation of unsolicited proposals, but do not provide further details on the treatment to be given to such proposals and the procedures to be followed. Admissibility criteria may generally include national priority, uniqueness and cost considerations. Another approach to unsolicited proposals may be to provide specific procedures for handling them, for instance by providing criteria for the review of unsolicited proposals, followed by submission of the project to competitive selection with some form of incentive or preference to the originator of the unsolicited proposal.

C. Qualification requirements

21. It is proposed to deal in a section with those conditions that have to be met by all prospective candidates regardless of the methods for selection of the project sponsors elected by the host Government.

22. The first group of requirements to be dealt with concerns requirements such as the financial standing of the prospective project sponsors, or their legal status. Some laws require a minimum rate of equity investment, as a percentage of the total investment cost, or establish a ceiling for the availability of public funds to the project. Such minimum investment may be complemented by provisions requiring the project sponsors to submit proof of adequate capability to sustain the financing requirements for the engineering, construction and operational phases of the project. There may also be negative criteria, such as rules declaring certain persons or categories of persons or companies to be ineligible for participating in the selection process (e.g. persons who, in one or the other form, participate in acts related to awarding the project, or companies that, having previously carried out a similar activity, had their concessions withdrawn by the State). It is proposed to consider the desirability for the law to deal with those requirements directly or to refer this matter to the procuring entity.

23. The second group of requirements proposed to be discussed in the same section can be found in provisions establishing some sort of preferential treatment for domestic entities or awarding special treatment to candidates that undertake to use national goods or employ local labour. Such preferential or special treatment may be provided as a condition for the selection of the project sponsors, as a criterion for the evaluation of offers, or as an obligation imposed on the project company. In some laws such preferential treatment takes the form of special evaluation criteria establishing margins of preference for national candidates, or candidates who offer to procure supplies, services and products in the local market. Yet other laws do not expressly refer to the use of domestic supply sources as an evaluation criterion, but include it among other elements to be mandatorily or voluntarily included in the offers. Other laws provide that, all other things being equal, preference should be given to national candidates. It is important, where such preferences are established, to weigh the advantages expected from such domestic preferences against the particular needs of the project. It is also important to ensure transparency in the application of such domestic preferences as criteria for awarding the project.

D. Selection process

24. It is suggested that a section describe and analyse the legislative framework of a typical competitive selection process for infrastructure projects in two subsections, one dealing
with provisions concerning prequalification criteria and one dealing with provisions governing the ensuing proceedings, including access to the project site, request for proposals, content of tenders or proposals, feasibility and other studies, tender securities, evaluation of tenders or proposals, award of the project and dispute resolution.

25. The first issue proposed to be considered in the subsection dealing with prequalification of sponsors relates to the invitation to prequalify, its mode of circulation and content. As to the prequalification requirements, it is proposed to discuss matters such as requirements concerning the legal status of the project sponsors, as well as experience and past performance (which may cover aspects such as past performance of the sponsors with similar or related projects, experience of their key personnel, organizational and financial capability).

26. Provisions governing the steps that follow the prequalification of tenderers or proposers are suggested to be considered in the following subsection. It is desirable that instructions to prospective project sponsors indicate in detail the aspects to be covered by their tenders or proposals, including technical, financial and legal proposals. Particular importance is to be given to the studies, such as feasibility studies to be submitted with the tenders or proposals, which should normally address issues such as marketability, engineering design, economic, financial and operational feasibility of the project, as well as an environmental impact study. The importance for the host Government to conduct or obtain its own feasibility studies would also be discussed. Another aspect to be covered in the instructions issued by the host Government concerns the criteria to be applied for the evaluation of tenders or proposals. In general, it might not be desirable to burden the legislation with details of the selection process. However, to a certain degree national legislation may play an important role in providing guidance to the procuring entity with regard to all those aspects. Likewise, national legislation may establish an appropriate framework for the function of the procuring entity during the remaining phases of the selection process. The law may, for instance, authorize that the final submission of tenders or proposals be preceded by a conference in which the parties have an opportunity to clarify questions concerning the project, and as a result of which the host Government may amend or rectify the instructions, as appropriate. It is proposed to conclude this subsection with a discussion of final negotiations and award procedures, as well as of appropriate mechanisms for solving disputes relating to the award of the project.

V. PREPARATORY MEASURES

A. The site of the project
1. Acquisition of land for the construction of the facility
2. Rights of way and other easements
B. Establishment of the concessionaire
1. The concessionaire as a consortium
2. The concessionaire as an independent legal entity
C. Licences and approvals

Notes
27. It is proposed to discuss in chapter V a few important steps in the preparations for the implementation of the project: the acquisition of land for the construction of the facility, including access to the project site; the establishment of the consortium or company that will receive the concession to build and operate the infrastructure facility; the issuance of licences and approvals necessary for carrying out the project activities. It is suggested that chapter V consider the extent to which national legislation could adequately address those issues without depriving the parties of the flexibility necessary for meeting the needs of individual projects.

28. An initial draft of chapter V is contained in document A/ CN.9/438/Add.3.

VI. THE PROJECT AGREEMENT

A. General considerations
B. The rights of the project company
1. Property rights
2. Exclusivity
C. General obligations of the project company
1. Project execution and related obligations
2. Guarantees of performance
3. Liability and insurance
D. Subconcession, assignment and securities
1. Subconcessions and assignment of the project
2. Securities and encumbrances

Notes
29. It is proposed to deal in one section with general considerations concerning the project agreement, discussing in particular the different approaches taken by national legislation concerning the project agreement (from those that scarcely refer to the project agreement to those that contain extensive mandatory provisions concerning clauses to be included in the agreement). Such a section would consider the possible advantages and limitations of existing approaches, taking into account the possibly varying need for legislative guidance on preparing a project agreement that may exist at different levels of Government (national, provincial or local). The remaining sections would deal with rights and obligations of the project company that, in addition to being dealt with in the project agreement, might be usefully addressed in the legislation, as they might affect the interests of third parties.

B. The rights of the project company
30. It is proposed to deal with the nature of the rights and interests of the project company in the facility and related property, a question for which various solutions can be found. In some countries the law expressly provides that title to all assets originally furnished by the host Government for the construction of the facility, as well as all facilities and improvements built by the project company, is vested in the host Government throughout the duration of the agreement. Other laws, however, give the project company some type of property right and provide in detail its nature and scope. It might be desirable for the relevant legislation to clarify the nature of the property rights of the project company, an aspect that is of particular importance where the legislation allows the establishment of some sort of security interest in those assets and property. Also, where the legislation requires the transfer of the facilities to the host Government at the end of the concession period, questions might arise as to who holds title to improvements made to property originally received by the project company.
31. It is further proposed to deal in the same section with two other questions particularly important for project sponsors and lenders (but also relevant for the host Government and the users of the facility), namely whether the concession is exclusive and whether competing facilities will be allowed to operate. Project sponsors and lenders will be interested in obtaining assurances that the facility will generate sufficient revenue to repay the project company's debt, recoup the investment and allow them a reasonable profit. Thus, national laws often authorize the host Government to grant an exclusive right to the project company to pursue the activity that is the object of the concession. In some cases, the host Government undertakes not to provide public funding for parallel projects that might generate competition to the project company. However, such exclusivity is not always guaranteed by the law. In some cases, the host Government may reserve the right to grant multiple concessions in the same area, provided this is specified in the solicitation of tenders. In some cases, the host Government is authorized to grant concessions under a regime of "regulated exclusivity" where the operation of the facility by the project company is monitored by a regulatory body so as to ensure that it meets the interests of the public, an aspect to be considered in more detail in chapter IX, "Operational phase".

C. General obligations of the project company

32. The obligations of the project company concerning the construction and operation of the facility are provided in some national laws by a general reference to the project company's obligation to finance, build, operate and maintain the facility, while other national laws include more extensive lists of obligations such as to supply adequate service or to observe and ensure observance of rules and regulations relating thereto. Particularly with a view to the eventual transfer of the facility to the host Government, some laws require that the project agreement contain provisions on technology transfer and stipulate the manner in which local personnel designated by the host Government will be given adequate technical training.

33. The obligations of the project company are sometimes complemented by the provision of some form of guarantee of performance or insurance against the consequences of default. The law may generally require that adequate guarantees of performance be provided by the project company and refer the matter to the project agreement for further details. Some laws, however, contain more detailed provisions for instance requiring performance bonds up to a certain percentage of the basic investment to be presented by the project company at the time of project commencement. Different guarantees of performance may have to be provided for the construction and for the operational phases. The host Government may also wish to require a guarantee for the performance by other companies associated in the execution of the project or sufficient evidence that the project sponsors have raised funds or secured finance sufficient for the carrying out of the project. One aspect to be considered is that, depending on the terms of the performance bond, serious guarantors may not be able to issue a bond for the whole duration of the project. It is proposed that the Guide consider the possible implications of prescribing specific types of guarantees in the legislation, rather than leaving this matter to be addressed in the project agreement.

34. Another issue proposed to be dealt with in the same section relates to legislative provisions dealing with damage caused to third parties in the course of the execution of the project or the operation of the facility. The project company is normally liable for damages caused to the host Government, the users of the service or third parties which result from the project company’s negligence. In some cases, such liability extends to liability for environmental damage. For the purpose of ensuring that the project company will meet its liability, some laws require that the project company purchase and maintain adequate insurance, including workmen's compensation insurance, while other laws establish an option of self-insurance against specific forms of liability, subject to approval by the host Government, in the event no insurance is available at a reasonable cost in the national or international insurance markets.

D. Subconcession, assignment and securities

35. It is proposed that a section discuss the questions of subconcession, assignment of the project company’s rights and security interests established to the benefit of the project company's creditors.

36. In cases where the project company is given the right to provide ancillary services, or where the concession involves multiple activities capable of being carried out separately, the project company may wish to engage another entity to carry out some of those activities. Some laws require that the project agreement prohibit a subconcession or any arrangement to that effect, in whole or in part, without prior approval of the host Government. A different approach can be found in national laws which, while still requiring prior approval by the host Government, authorize subconcessions provided that the subconcession is awarded through a competitive method and the subconcessionaire assumes all the rights and obligations of the concessionaire within the scope of the subconcession.

37. During the life of the project, it may happen that third parties become interested in substituting for the project company. Also, situations may arise where, due to the failure or inability of the project company to perform its obligations, it might be in the interest of the parties to allow the project to continue under the responsibility of another company or consortium. This may be done by means of an assignment of the concession to a third party. Few laws prohibit categorically any assignment of the concession, while other laws authorize such an assignment, subject to approval by the host Government, which may also be required for a transfer of the right to control the project company. The lenders, whose main or sole recourse is the revenue generated by the project, may have an interest in ensuring that the works will not be left incomplete and that the concession will be operated profitably in the case of inability of the project company to do so. In some cases, the law recognizes such an interest and provides that under certain circumstances the lenders may have an option to appoint a new project company to substitute for the initial project company, subject to approval by the host Government.

38. One essential factor for obtaining financing for the project is the ability of the project company to offer acceptable security interests to the lenders, such as mortgages or assignment of receivables generated by the project. Some laws expressly recognize that interest by allowing the project company to create a security interest over the concession, the rights arising from the concession or the property involved, with the consent of the host Government. Some laws specifically authorize the establishment of mortgages or other security interests in the project's property, provided that such property continues to be used for the purposes of the concession. Some laws, however, strictly prohibit the establishment of any encumbrance on the concession or the rights related to it, or provide that the concession agreement may contain such a prohibition. It is proposed to discuss the possible implications of these approaches.
VII. GOVERNMENT SUPPORT

A. Financial support
1. Sovereign guarantees
2. Loans and revenue assurances

B. Incentives, facilities and benefits
1. Taxation and customs
2. Ancillary revenue sources
3. Other assurances and facilities

Notes

A. Financial support

39. The proposed topic for the opening section of chapter VII relates to financial measures that may be taken by the host Government for the purpose of reducing the commercial, financial, political, or other risks faced by the project company and the lenders. One of the host Government’s motivations for pursuing privately financed infrastructure projects is often to limit the commitment of public funds, a motivation which is reflected in those laws that provide that the concessionaire alone is responsible for the financial viability of the project with no guarantees being given by the host Government. Other laws, in turn, with a view to encouraging private investment, authorize the host Government to share the project risks by contemplating some form of financial support by the host Government, in the form of guarantees or loans, without which the project might not materialize. It is proposed to consider the desirability of allowing some flexibility for the host Government in devising the level of support it may provide to the implementation of the project. For that purpose, it is suggested to examine types of support that are sometimes contemplated in national legislation, and which in some countries might require special legislative authorization.

40. Guarantees contemplated in national laws may include: foreign exchange guarantees such as the guarantee that the revenue generated by the facility may be converted into foreign currencies, for the purposes of repaying loan capital and interest, paying expenditures requiring foreign currency, or paying to foreign investors their share of profits; guarantees of payment of goods and services supplied by the project company when the goods or services are supplied to the host Government or a public entity; loan guarantees concerning the repayment of loans taken by the project company. Since the project company’s ability to repay loans is essentially predicated upon the revenue generated by the project, a governmental guarantee of repayment of loans might assure the lenders and the project company that they would not be unreasonably exposed in the case of early termination of the agreement or other unforeseeable changes of circumstances or emergency situations outside the control of the project company that render the project company temporarily unable to operate the project or meet its financial obligations. Some forms of guarantees provided by the host Government may be supported by a guarantee issued by international financial institutions, such as the World Bank. Some of those institutions may give guarantees or provide insurance coverage against a number of risks directly to the benefit of the private sector.

41. In addition to guarantees, in some cases the host Government, directly or through a governmental agency, may itself extend certain loans to the project company for specific purposes, such as to cover possible loss or damage caused by the host Government or due to force majeure events, or to finance modifications of the project agreement. Such loans may require the provision of some collateral by the project company, such as a mortgage of real estate provided to the project company for the development of the project. The provision of such loans, like loan guarantees, might be a way for the host Government to share the project risks without an upfront commitment of public funds. From the perspective of lenders and sponsors, such risk sharing might be significant for reducing or limiting their exposure to loss that results from unilateral acts of the host Government or other events beyond the control of the project company.

42. Another type of financial support may be an assurance by the host Government of a minimum revenue to the project company. When the Government or a governmental entity is the sole customer for the services or goods supplied by the concessionaire, the law sometimes provides that the Government or some governmental entity will be under an obligation to purchase such goods and services, at an agreed rate, as they are offered by the concessionaire. With regard to services provided directly to the public, the host Government sometimes undertakes to subsidize the project company, in the event that officially approved tariffs fall below the level provided in the project agreement. In other cases, the project company is paid a flat or variable sum directly by the host Government, on the basis of an estimated number of paying users of the facility arrived at in the course of the selection process.

B. Incentives, facilities and benefits

43. It is proposed to deal in a separate section with other forms of support that are often provided to privately financed infrastructure projects. The host Government may grant some form of tax and customs exemption, reduction or benefit to the project company (e.g. to facilitate the import of equipment for the use of the project company by means of exemption of customs duties), or may establish some preferential tax treatment. Sometimes the law authorizes the host Government either to grant an exemption from customs duty or to guarantee that their level will not be raised to the detriment of the project.

44. One form of reducing the commercial risk to which the project company is exposed may consist in offering the possibility of additional concessions for the provision of ancillary services or the exploitation of other activities. By giving the project company alternative sources of revenue the host Government could make it possible for the project company to follow a policy of low or controlled prices for the main service. Thus, some laws authorize the host Government to provide in the solicitation of tenders that the concessionaire will be given the possibility of other revenue sources from alternative, complementary or ancillary projects, with or without exclusivity, with a view to encouraging low tariffs. The law sometimes provides that the host Government may grant the project company the right to use property belonging to the host Government for the purposes of such activities (e.g. land adjacent to a highway for construction of service areas).

45. Additional assurances and facilities that may be provided by the host Government to the project company may include the provision of various forms of insurance coverage to the project company or its employees, or an assurance that the project company will be provided with, or will have facilitated access to, supplies, goods and facilities which are needed for the operation of the infrastructure facility.

VIII. CONSTRUCTION PHASE

A. Contractors of the project company
1. Award procedures
2. Contractual regime
B. Project development

1. Monitoring of project development
2. Acceptance and final approval

Notes

A. Contractors of the project company

46. Given the complexity of infrastructure projects, the project company is likely to retain one or more contractors for performing the works under the project agreement. It is proposed that a section of chapter VIII deal with the procedures for selecting those contractors and with the laws governing their contracts with the project company.

47. Two basic approaches have been used for dealing with the selection of the contractors of the project company. Some laws require the project company to identify in its tender or proposal the contractors that will be retained, including information on their technical capability and financial standing; other laws only require prospective project sponsors to indicate the percentage, if any, of the total value of the work which they intend to assign to third parties. There are also laws that require the project company to observe essentially the same procedures for selecting its contractors as were applied to the selection of the project company itself, an obligation which may also extend to the subcontractors of the contractors.

48. The group of project sponsors often includes engineering and construction companies, which participate in the selection process in the expectation that they will be given the main contracts for the execution of the construction and other works. Those companies might be reluctant to join the other project sponsors if they had no assurance of being awarded those contracts. One possible solution might be to have a rule similar to the procurement rules of some international financial institutions, which provide that, where the project company was selected under a competitive method acceptable to such financial institutions, the project company is free to use its own procedures to procure goods, works and services required for the facility. However, where the project company itself was not selected through a competitive method acceptable to such financial institutions, the goods, works and services required for the facility have to be procured through a competitive method.

49. It is common for the project company and its contractors to choose a law that is familiar to them and that in their view adequately governs the issues addressed in their contracts. Prospective project sponsors would not normally be inclined to subject their contracts to a legal system that is unknown to them and might, therefore, be reluctant to participate in a project if the laws of the host country subject all their contracts to its national law, or require the approval of the host Government for the application of foreign law. In most cases, however, Governments have found no compelling reason for making provisions on the law applicable to the contracts between the project company and its contractors, and have preferred to leave this question to a choice of law clause or to the rules on conflict of laws. In some cases, provisions have been included for the purpose of clarifying, as appropriate, that the contracts entered into between the project company and its contractors are exclusively governed by private law, that the contractors are not agents of the host Government, and that, accordingly, the host Government has no liability for the acts of the contractors or no obligation to pay compensation for work-related illness, injury or death to those contractors’ employees.

50. In section B of chapter VIII it is proposed to discuss legal issues relating to the development of the project, including procedures for monitoring the progress of the construction works and for the final acceptance of the infrastructure facility.

51. National laws often contain provisions concerning the development of the project and the procedures to ensure compliance by the project company with the engineering design and technical specifications. The initial construction project may be subject to review by the host Government so as to ensure that it conforms to the specifications and technical requirements for the development of the project. For the purpose of avoiding delay in the commencement of the construction, the law may establish deadlines for the approval of the construction project by the host Government and provide that the approval is deemed to be granted if no objections are made by the host Government within a certain period. Should the host Government find that the construction project deviates from the specifications, the law sometimes expressly provides that the host Government will have the right to request modifications in the project, and clarifies that the host Government will not be liable for delays that result from the need to make such modifications. In some cases, in addition to setting a deadline for the review of the construction project by the host Government, the law may expressly limit the grounds on which the host Government may raise objections to the project and establish rules for solving disagreements.

52. Following approval of the construction project, the law often provides for continued monitoring by the host Government throughout the construction phase. The law may deal with the execution of the project in several stages, in accordance with the time-table provided in the project agreement, and require governmental approval for the formal completion of each stage. For the purpose of facilitating the liaison between the host Government and the project company, the law sometimes requires the host Government to designate one officer to exercise all monitoring functions provided in the law, or indicate which governmental organ is to do so. In some projects it was found useful to require the project company to appoint an independent project manager, thorough whom all communications with the relevant governmental entity would be channelled.

53. When the works performed by the project company are found to be unsatisfactory or inconsistent with the specifications, the law sometimes provides that the project company may be subject to penalties or liquidated damages as provided in the project agreement. It is proposed to discuss this matter in chapter X, “Performance issues”.

54. Upon completion of construction, some laws provide for a final inspection and approval of the works by the host Government, as a condition for authorizing the project company to operate the facility. The law may also authorize a provisional operation of the facility, pending final acceptance by the host Government. The final inspection of the facility sometimes includes the testing, as required, of any equipment installed by the project company, so as to ensure that it is in proper operating condition, providing an opportunity for the project company to cure defects that might be found at that juncture. In respect of facilities to be used by the public, provisions of this kind may be of great importance for the host Government, particularly in those countries where the State would have a direct or residual liability to the public for damage or injury attributable to defects in the construction of the facility. In the case of other facilities closed to the public and normally accessible only by the project company and its personnel, the public interest may be less prominent, and the host Government may
XI. OPERATIONAL PHASE

A. General regulatory considerations

B. Conditions of operation
1. Scope and quality of services
2. Price and price increases
3. Relations with users
C. Inspections and monitoring
1. General inspection measures
2. Special monitoring powers

Notes

A. General regulatory considerations

55. It is proposed to deal in the opening section of chapter IX with general regulatory issues concerning the operation of the infrastructure facility by the project company. In pursuing private-sector participation in infrastructure, Governments usually expect to achieve efficiency gains and high standards of service, which sometimes may not be provided by self-regulated State monopolies. Where multiple concessions are awarded for the same sector, the host Government may expect that the competition among the concessionaires will have a certain regulatory effect and will be conducive to achieving efficiency and quality targets. However, Governments may find that the market cannot always be relied upon for solving issues relating to the operation of the infrastructure facility in a manner that satisfies the public interests, so that some form of external regulation might still be necessary. Even greater might be the need for such external regulation in the case of exclusive concessions where a natural monopoly takes the place of a State monopoly.

56. In some cases, the host Government may attempt to address all regulatory issues (e.g. quality of services, level of tariffs) in the project agreement or in the pertinent legislation, an approach which may not always be adequate to the long-term nature of privately financed infrastructure projects. In other cases, the project company might be given great freedom to establish its own commercial and pricing policies, a solution which some Governments might be reluctant to adopt. Governments that wish to reserve for themselves the possibility of regulating the operation of the infrastructure facility sometimes give such power to the same authority that awarded the concession. Other Governments, however, may prefer to establish another body for that particular purpose and give such body certain latitude in the exercise of its functions. However, the mechanism is conceived, Governments might find it useful to provide a certain level of legislative guidance for the exercise of such regulatory functions.

B. Conditions of operation

57. After the above general regulatory considerations, it is proposed to deal in a separate section with three basic issues relating to the conditions of operation of the infrastructure facility: the scope and quality of the services provided by the project company, the establishment and adjustment of the price charged by the project company, and the relations of the project company with the purchasers of the goods or services or the users of the facility.

58. The law may sometimes mention in general terms the scope of the services to be provided by the project company, particularly those laws governing one particular sector or service. Sometimes the scope of the services and the manner in which they have to be provided may be subject to rules issued by the competent regulatory body, or rules issued by the project company, with that body's approval. In addition to general rules concerning the scope of the services, some laws provide criteria for assessing the quality of the services to be provided by the project company as well as general definitions of applicable standards of quality. Another approach is to leave this matter to the project agreement.

59. Although recognizing that the terms of the concession are subject to the agreement of the parties, in some legal systems the host Government has the right to change the scope and characteristics of the services to be provided by the project company for reasons of public interest, subject to compensation for financial loss or additional costs that result for the project company from such unilateral changes by the host Government.

60. As regards the prices charged by the project company, two basic approaches have been observed: in some cases the project company is free to determine its pricing and commercial policy, while in other cases the law subjects the initial price charged by the project company to some control mechanism (e.g. approval by the competent regulatory body, or requirement that the prices be provided in the project agreement). The competent regulatory body may have to approve criteria and parameters to be followed for determining reasonable price levels that allow the project company to recover the investment and achieve a reasonable rate of return. In some cases, the law itself may provide the method for determining the prices to be charged by the project company.

61. In addition to making provision for determining the initial prices, national laws may provide rules governing the adjustment of those prices during the term of the agreement. The proposed tariff level is often an important, if not decisive factor in the selection of the project sponsors. Thus, the host Government may have an interest in establishing reasonable limits for increase of tariffs so as to discourage prospective project sponsors from submitting unrealistically low proposals in the expectation of being able to raise the tariffs at a later stage. Criteria and parameters for price adjustments are sometimes included in the law, as in the case of official price indices. In addition to variations in official price indices, some laws provide that the competent regulatory body will authorize price adjustments when the costs of the project company rise as a result of an act of the host Government including changes in taxation subsequent to the project agreement. For the purpose of devising appropriate mechanisms for price adjustments, it is desirable that the host Government bear in mind the expectations of other parties involved. For instance, the lenders might need a predetermined formula for price adjustments in order to estimate the revenue of the project. Thus, the lenders might wish to have such formula reflected in the project agreement, or some other document of general application, rather than being subject to the sole discretion of a regulatory body. Therefore, when a regulatory body is given the authority to approve parameters or conditions for price increase, the lenders might find some comfort in that the guidelines for the exercise of such authority are provided by the law.

Another related issue is the extent to which, in the interest of the project, the law may exempt the project company from specific legislation relating to price and tariff control or providing special treatment in favour of certain categories of users.
62. Where the project company provides a service directly to the public, the law sometimes contains provisions regulating their relations or spelling out the rights and obligations of the users of the service concerned. The project company is often required to provide the service without discriminating against any group of users, except for differences based on objective considerations, such as the technical characteristics and the specific costs resulting from providing the service for different categories of users. In some cases, the project company may be required to enter into contracts with the users of the service or the consumers of the goods supplied by the project company (such as gas, water or electricity). Depending on the nature of those goods or services, the law may establish a chain of legal arrangements, each governed by a different contract, such as between energy producer and transporter, energy transporter and energy distributor and energy distributor and consumer.

63. In some cases, the project company is required to establish procedures for dealing with complaints and claims by the users of the service. In other cases, the law entrusts the competent regulatory body or other governmental agency with the responsibility of protecting the interests of the users of the service and guaranteeing their right to file complaints with such agency.

C. Inspections and monitoring

64. Given the importance of infrastructure projects for the host Government, and the Government's ultimate accountability for the quality of services provided to the public, the host Government is likely to retain the right to monitor the operation of the facility or to submit special reports upon request. Possible legal approaches vary from laws which appoint officers to carry out inspections, specify the powers given to them and describe in detail the procedures for such inspection, to those laws that only refer to such inspection and monitoring powers in general terms and require that the relevant procedures be provided in the project agreement. Furthermore, the project company may be required to report regularly to the competent regulatory body or to submit special reports upon request. The consequences for the project company of a breach of its contractual or statutory obligations may include fines or other pecuniary sanctions, as provided in the law, an issue which is proposed to be considered in chapter X, "Performance issues". In general, however, the exercise by the host Government of such monitoring functions does not relieve the project company of its own liability for damage sustained by the host Government, users or third parties as a result of the breach of its obligations.

65. It is generally desirable that inspections and control measures be carried out in such a manner so as to cause the least possible disturbance to the operation of the facility or to avoid unreasonable intervention in its operation. With regard to the cost of inspection and related measures, some laws provide that the project company may be required to bear such costs, as determined by the host Government, whereas other laws refer this matter to the project agreement.

66. In addition to general inspection powers, some national laws authorize the host Government to appoint a temporary administrator (see also paragraphs 37, above).

X. PERFORMANCE ISSUES

A. Delays, defects and other failures to perform

1. Definition of failure to perform

2. Failure during the construction phase and during the operational phase

B. Exemption provisions

1. Definition of exempting events

2. Consequences for the parties

C. Change of circumstances


2. Hardship provisions

Notes

A. Delays, defects and other failures to perform

67. It is proposed to deal in a section with performance failures by the project company, an issue to which different approaches have been used in national laws. In some countries the legislation does not contain specific provisions on this matter, which is left for the project agreement. Other laws, however, contain generally worded provisions defining breach of contract by the project company and providing remedies, which constitute a general framework for more detailed provisions in the project agreement or in specific regulations. In making provisions on this issue, it might be desirable to distinguish, as some laws do, between failures that occur during the construction phase and failures in the operation of the facility by the project company.

68. The project company may be required to take a number of measures before the execution of the project (e.g. to secure the necessary financial means; to prepare the technical documentation; to sign the project agreement within a certain period from the award of the concession; to establish the project company; to obtain licences or permits). Remedies available to the host Government in the event of failure by the project company to meet those conditions may take different forms, including, for particularly important conditions, the termination of the project agreement. In those cases, it might be desirable to provide that the host Government will give written notice to the project company to meet pending conditions, prior to terminating the project agreement. With regard, in particular, to termination for failure to obtain licences, it might be further desirable to specify that no termination would take place when the failure is not attributable to the project company's fault. Such a provision might reassure lenders and sponsors that they would not be penalized, for instance, by inaction or error on the part of the host Government or its agents.

69. During the construction phase, performance failures might relate to two broad categories: delay in construction and defective construction. Remedies available for failures at that stage may include payment under guarantees provided by the project company, payment of liquidated damages or penalties, or fines. Generally, it might be sufficient for the law to require that the project agreement contain provisions on this matter, rather than to establish a scheme of remedies applicable to all types of projects. In most situations, it might be advisable to treat the termination of the project agreement and withdrawal of the concession as last resort measures to be used only in
case of particularly serious or repeated failures, or when it can no longer be reasonably expected that the project company will be able or willing to complete the work or cure the defects. In some countries, special procedures apply for establishing the failure of the project company prior to resorting to contractual remedies. Both the host Government and the lenders will be interested in ensuring that the construction of the facility is completed. Thus, in some cases, rather than terminating the agreement and assuming the responsibility for, and the cost of, the completion of the facility, the host Government might wish to give the lenders the opportunity to appoint a substitute company, acceptable to the host Government, to complete the unfinished infrastructure facility and bring it into operation (see paragraph 37, above).

70. Also, during the operation of the facility, it might be desirable for the law to give the parties the possibility of establishing a hierarchy of remedies available to the host Government, according to the seriousness and repercussions of the failure by the project company, which might be accompanied by provisions prescribing the procedures for establishing performance failure and resorting to available remedies. In some legal systems, the host Government has the right to take over temporarily or permanently, from performing its contractual obligations and that are often referred to by expressions such as "force majeure" and other terms with similar meaning. Such impediments may be the consequence of natural phenomena, such as fire, storms or flood, or of human actions, such as war, riots or revolts. The occurrence of an exempting event may sometimes justify the suspension of the project execution or the operation of the concession for the duration of the impediment subject to a maximum period of suspension. Whether or not the project company will be entitled to claim compensation from the host Government or whether the host Government will share some of the costs entailed by the suspension of the project are questions to which national laws provide different answers. A procedure for determining, in a given case, whether an event falls within the category of force majeure is sometimes spelled out in the law.

B. Exemption provisions

71. In drafting national legislation, it is desirable to take into account events that might preclude the project company, temporarily or permanently, from performing its contractual obligations and that are often referred to by expressions such as "force majeure" and other terms with similar meaning. Such impediments may be the consequence of natural phenomena, such as fire, storms or flood, or of human actions, such as war, riots or revolts. The occurrence of an exempting event may sometimes justify the suspension of the project execution or the operation of the concession for the duration of the impediment subject to a maximum period of suspension. Whether or not the project company will be entitled to claim compensation from the host Government or whether the host Government will share some of the costs entailed by the suspension of the project are questions to which national laws provide different answers. A procedure for determining, in a given case, whether an event falls within the category of force majeure is sometimes spelled out in the law.

C. Change of circumstances

72. Some laws deal with the rights of the project company in the event the execution of the project is prevented by an act of the host Government. In some cases, the relevant rules contain a general undertaking by the host Government not to interfere with the execution of the project, except under special circumstances. In other legal systems, however, the host Government usually has the right to alter the terms of a concession when the public interest so requires, subject to compensation to the concessionaire. If the execution of the project is interrupted as a consequence of a governmental act, the project company may be entitled to an extension of the concession period as well as compensation for the damage it sustained. While in some cases it might be impliedly understood that the host Government will be responsible to pay such compensation, it might be advisable to include a specific provision in the legislation to that effect, so as to reassure the project company that it would not have to bear additional costs as a result of governmental acts which were not prompted by any failure on its part.

73. Another related matter concerns changes in factors that, without preventing the performance of contractual obligations, render the performance by the project company considerably more onerous than foreseen at the time those obligations were assumed. Some legal systems have special rules dealing with such situations, which allow a revision of the terms of the project agreement so as to restore its original economic equilibrium. In some cases, the possibility of a revision of the terms of the agreement is generally implied in all governmental contracts, or is expressly provided for in legislation. Some laws on privately financed infrastructure projects generally recognize the possibility of such changes of circumstances but refer the matter to the project agreement for concrete solutions.

XI. EXPIRY, EXTENSION AND EARLY TERMINATION OF THE PROJECT AGREEMENT

A. Expiry of the project agreement

74. It is suggested to discuss the expiry, extension and early termination of the project agreement, dealing first with the consequences of the expiry of the term of the project agreement and the transfer of the project to the host Government at the end of the project period.

75. Many national laws limit the duration of the concession to a maximum number of years, which sometimes expressly include the construction period, as well as any extension given for reasons of force majeure. The rationale for including the construction period in the total concession period is to encourage the project company to complete the construction works ahead of schedule, so as to benefit from a longer period of concession. In some cases, however, Governments have preferred to establish a combined system whereby the project agreement ends once the debts of the project company have been fully repaid and a certain revenue, production or usage level has been achieved, subject to a maximum limit of a fixed number of years.

76. In a typical "build-operate-transfer" project, the infrastructure facility is normally transferred to the host Government at the end of the concession period. Some laws expressly provide that the assets to be transferred include not only those originally provided to the project company, but also those assets, goods and property subsequently acquired by it for the purpose of operating the facility, while other laws leave this question to be clarified in the solicitation of tenders or in the project agreement. Some laws specifically provide that, upon termination of the concession, the host Government will compensate the project company for the cost of those improvements made upon the original property for the purposes of
ensuring the continuity of the service which at that time have not yet been recovered by the project company. The host Government in these cases has the right to receive the unused property related to the concession in good and operating condition. For that purpose, the project company may be required to provide some sort of financial guarantee. In some cases a special inspection of the facility takes place prior to the termination of the concession, as a result of which the host Government may require additional maintenance measures by the project company so as to ensure that the facility is in proper condition at the time of the transfer. In some cases, the law may require additional maintenance measures by the project company to recover the cost of extraordinary work required to be done on the facility.

B. Extension of the project agreement

77. In the second section of chapter XI it is proposed to consider the possibility of an extension of the project agreement, an issue on which different solutions are found in national laws. Some laws authorize one or more extensions of the concession period for an equal or shorter term, while other laws generally prohibit extensions, save for exceptional conditions, such as to allow the project company to recover the cost of extraordinary work required to be done on the facility.

78. Limitations on the extension of the concession period are sometimes provided as a protection for the host Government against demands by the project company. In some cases, with a view to encouraging competition in the sector concerned, the law requires the host Government to submit the concession, upon its expiration, to public tendering, in which case the project company may be given a margin of preference over other equally qualified candidates.

C. Early termination

79. It is suggested to discuss in a separate section the events or circumstances that cause or justify the early termination of the project agreement and the consequences that derive therefrom for the parties.

80. Main grounds for early termination normally include any of the following: the opening of certain types of insolvency proceedings in respect of the project company; the expropriation of the project company; the termination for reasons of public interest; the inability or serious failure by the project company to perform its obligations; or the failure by the host Government to perform its obligations.

81. The expropriation of the concession, or its takeover by the host Government for reasons of public interest, is typically subject to a special procedure and payment of appropriate compensation. A few laws expressly give the project company the right to terminate the agreement in the event of default or failure by the host Government to perform its obligations.

82. In the event of insolvency, failure or inability of the project company to continue to provide the service, it may be in the interest of the host Government to make provisions to avoid the interruption of the service. The law may provide that, in such cases, the host Government may appoint a temporary administrator so as to ensure the continued provision of the relevant service, or give the lenders the right to substitute for the project company, or appoint a substitute. Some laws provide for the continuation of such temporary administration until the creditors admitted to the insolvency proceedings decide, upon recommendation by the insolvency administrator, whether the activity will be pursued or whether the right to exploit the concession will be put to auction. In some cases, the law excludes the assets and property related to the concession from liquidation or insolvency proceedings, or requires prior governmental approval for any act of disposition by a liquidator or insolvency administrator (see also paragraph 66, above).

83. Unlike early termination as a sanction for the project company's failure to perform its obligations, an early termination for reasons of public interest is not normally attributable to acts of the project company, a distinction which may be taken into account by the law when determining the compensation to be paid to the project company in each case.

XII. GOVERNING LAW

Notes

84. It is proposed to deal in a chapter with the issue of the law applicable to privately financed infrastructure projects and the possible implications of different laws applying to different aspects of the project.

85. Some national laws on privately financed infrastructure projects contain provisions on the law that applies to the project agreement between the host Government and the project company, often mandating the application of national law. Depending on whether the legal regime of the concession is regarded as a contract or as an act of Government (a question to be addressed in chapter III, "General legislative considerations" and chapter VI, "The project agreement"), the law might give preference to either private or administrative law. In the latter case, a different approach is taken by those laws that provide for the subsidiary application of administrative law only, or that establish a hierarchy of legal provisions applying to the project. In general, it might be desirable to clarify in the law whether and to what extent the project agreement may deviate from, or supplement, the provisions of such legislation.

86. In some countries, the law governing privately financed infrastructure projects does not contain a specific provision on the extent to which the project agreement may be subject to a law other than the law of the host Government. Another approach used has been to list the areas in which the law of the host country is to apply (e.g. transfer of technology, accounting, labour relations, foreign exchange control) and to provide that in respect of issues not governed by the laws of the host country, the project agreement may be made subject to a foreign law.

87. The law applicable to the contracts entered into by the project company with entities other than the host Government varies. Loan agreements will be often subject to the laws of a jurisdiction chosen by the parties. Agreements among the project sponsors may also be subject to foreign law. In turn, the contracts between the project company and its local customers and users of the facility, or with its local employees, suppliers or other commercial partners, are often subject to the laws of the host country. It is important for the parties to consider carefully the enforceability in the host country of rights created or obligations assumed in other jurisdictions. At the same time, it might be advisable for the host Government to review pertinent provisions of national law in the light of the commitment that the project company is required to make for obtaining the financial and other means necessary for the implementation of the project.
XIII. SETTLEMENT OF DISPUTES

Notes

88. It is proposed to deal in a section with the legislative framework for the settlement of disputes that might arise in connection with a privately financed infrastructure project.

89. Disputes between the project company and foreign contractors, or between the host Government and the project company, are frequently of a commercial nature and it has often been agreed to subject those disputes to arbitration. An appropriate legal framework for the settlement of those disputes may be provided by means of special legislation, based on internationally accepted standards, governing international commercial arbitration and reflecting particular needs of international arbitration. A particularly suitable model for such legislation is the UNCITRAL Model Law on International Commercial Arbitration.

90. It should be noted, however, that there might be limits to the availability of arbitration for disputes between the project company and the host Government under some legal systems, such as in those countries where disputes involving the Government come mandatorily under the jurisdiction of the national courts.

91. In view of the potentially large and complex disputes that may arise out of a privately financed infrastructure project, it might be desirable for the law to enable the parties to devise mechanisms for dealing with divergencies as they arise and for avoiding their escalation into open litigation. In some cases, the parties found it useful to establish expert panels, with varying composition according to the nature of the issues at stake, which make recommendations to the parties for the settlement of their disputes. The implementation of the project might experience difficulties if even minor disagreements or disputes over technical issues needed to be submitted to lengthy proceedings for lack of an express legislative authorization for a mechanism to settle those disputes at an early stage.

92. Another category of disputes which may be of concern for the host Government are the disputes between the project company and its customers. The project company may be authorized, or in some cases required, to establish dispute settlement mechanisms. The extent to which such mechanisms may displace the jurisdiction of national courts depends on the laws of each country.

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CHAPTER I. SCOPE, PURPOSE AND TERMINOLOGY OF THE GUIDE

A. Transactions covered by the Guide

1. Privately financed infrastructure projects are transactions pursuant to which the national, provincial or local Government engages a private entity to develop, maintain and operate an infrastructure facility in exchange for the right to charge a price, either to the public or to the Government, for the use of the facility or the services or goods it generates.

2. The transactions covered by the Guide may be used for the private financing of various types of facilities, including, for example, power-generation plants, facilities for treatment of waste water or supply of potable water, toll roads, railways, airports, telecommunication networks. Generally, the transactions covered by the Guide relate to infrastructure facilities that are destined to be used by the public or that generate some form of commodity or provide some form of service to the public. Not covered in the Guide are transactions for the "privatization" of State property or functions by means of the sale of State property or shares of State-owned entities to the private sector. Furthermore, the Guide does not cover transactions for the exploitation of natural resources, such as oil or mining "concessions" or "licences".

B. Purpose of the Guide

3. The purpose of the Guide is to assist national Governments and legislative bodies in reviewing the adequacy of laws, regulations, decrees and similar legislative texts relating to transactions for the private financing, construction and operation of public infrastructure facilities.

4. The Guide sets out a number of issues often addressed in national laws and regulations pertaining to privately financed infrastructure projects, which were taken into account in the preparation of the Guide. The Guide discusses the desirability of dealing with those issues in legislation and offers examples, as appropriate, of possible legislative solutions on certain issues. The thrust of the advice provided in the Guide is to achieve an appropriate balance between the need to attract private investment for infrastructure projects and the need to protect the interests of the host Government or the users of the infrastructure facility. The Guide does not provide a single set of model solutions for the issues considered, but helps the reader to evaluate different approaches available and to choose the one suitable in the national context.

C. Terminology used in the Guide

5. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the Guide or which are often used in national laws or writings in connection with privately financed infrastructure projects. For terms not mentioned below, such as terms of art used in financial and business management writings, the reader is advised to consult other sources of information on this subject, such as the "Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects prepared by the United Nations Industrial Development Organization (UNIDO)."
1. Build-operate-transfer (BOT) and related expressions

6. A public infrastructure project is said to be a “build-operate-transfer” (BOT) project when the host Government selects a private entity to finance and construct an infrastructure facility and gives the entity the right to operate the facility commercially for a certain period, at the end of which the facility is transferred to the Government. Usually the host Government holds title to the facility and the land on which it is built. However, the parties may provide that the private entity will own the facility until it is transferred to the host Government, in which case the project is referred to as a “build-own-operate-transfer” (BOOT) project.

7. One variation of BOT projects are the “build-rent-operate-transfer” (BROT) projects or “build-lease-operate-transfer” (BLOT) projects, where, in addition to the obligations and other terms usual to BOT projects, the private entity rents the physical assets on which the facility is located for the duration of the agreement. In some projects, such as the “build-transfer-operate” (BTO) projects, it is expressly provided that the infrastructure facility becomes the property of the host Government immediately upon its completion, the project company being awarded the right to operate the facility for a certain period.

8. “Build-own-operate” (BOO) are projects in which, as in BOOT projects, a private entity is engaged for the financing, construction, operation and maintenance of a given infrastructure facility in exchange for the right to collect fees and other charges from its users. However, under this arrangement the private entity permanently owns the facility and its assets and is not under an obligation to transfer them back to the host Government.

9. A similar arrangement is the “design-build-finance-operate” (DBFO) modality, which also entails ownership of the infrastructure facility by the private sector, and in which the private sector assumes the additional responsibility for the design of the facility.

10. There are also arrangements whereby existing infrastructure facilities are turned over to private entities for being modernized or refurbished, operated and maintained, permanently or for a given period time. Depending on whether the private sector will own such infrastructure facility, those arrangements are called either “refurbish-operate-transfer” (ROT) or “modernize-operate-transfer” (MOT), in the first case; or “refurbish-own-operate” (ROO) or “modernize-own-operate” (MOO) in the latter case.

11. Sometimes all of the above transactions and other possible forms of privately financed infrastructure projects are generally referred to with the acronym “BOT”. In the Guide, however, the term “BOT” is only used in reference to the particular type of privately financed infrastructure projects described in paragraph 6.

2. “Project agreement” and related words

12. As used in the Guide, the words “project agreement” mean an agreement between the host Government and the private entity or entities selected by the host Government to carry out the project, and which sets forth the terms and conditions for the construction or modernization, operation and maintenance of a public infrastructure facility.

13. The expression “project sponsors” refers to the group of companies that submit a joint proposal or tender for the development of an infrastructure project and agree to carry it out jointly if awarded the project by the host Government.

14. The words “project consortium” are used in the Guide in a narrow sense to refer to an unincorporated joint venture created by the project sponsors for the specific purpose of carrying out the project, when the laws of the host country do not require the establishment of an independent legal entity for that specific purpose (see chapter V, “Preparatory measures”, paragraphs 29-37). The words “project company” are used to refer to the independent legal entity established by the project sponsors for the purpose of carrying out the construction works and operating the infrastructure facility.

3. “Concession” and related terms

15. When some writings or legislative texts refer to privately financed infrastructure projects, they may use expressions such as “concession”, “franchise”, “licence” or “authorization”. In some national laws, particularly those pertaining to the civil law tradition, certain forms of privately financed infrastructure projects are referred to by well-defined legal concepts such as “public works concession” or “public service concession”. These concepts are governed by elaborate provisions that are part of a specific body of law, typically referred to by expressions such as “administrative law”. In other national laws, however, privately financed infrastructure projects do not fall under a separate body of law and are dealt with by rules governing the activity to which the project pertains.

16. The Guide uses the word “concession” to refer generally to the right given to the project company or consortium to construct and operate the public infrastructure facility and to charge for its use or for the services or goods it generates. As used in the Guide, the word “concession” is not to be understood in a technical meaning that may be attached to it under any particular legal system or national laws.

17. The expressions “concession agreement” and “concession contract” are used in some legal systems to refer to the agreement between the host Government and the project company or consortium setting forth the conditions for the implementation of the project. In the Guide the words “project agreement” are used in that meaning.

18. Another related term is the word “concessioneer”, which often is used to refer to the private entity which is awarded the concession by the host Government. When used in the Guide, such word is a synonym of “project company” or “project consortium”.

Part Two. Studies and Reports on Specific Subjects
4. Host Government and related expressions

19. The expression “host Government” is generally used in the Guide to refer to the national, provincial or local authority which has the overall responsibility for the project and on behalf of which the project is awarded.

20. The term “procuring entity” is used in the Guide to refer to the organ, agency or official within the host Government which is responsible for selecting the project sponsors and awarding the project. Depending on the system of the host country, more than one organ, agency or official may be involved in the selection process and related procedures leading to the award of the project.

21. The expression “regulatory body” is used in the Guide to refer to the governmental organ or entity, or a body created by statute, that is entrusted with the authority to issue rules and regulations governing the operation of the infrastructure facility. In some countries, that authority is vested in the procuring entity itself.

5. Lenders and international financial institutions

22. The word “lenders”, as used in the Guide, refers to public or private financial entities which extend loans for the implementation of the project.

23. The Guide uses the words “international financial institutions” to refer to intergovernmental organizations that may provide funds or financial guarantees to the implementation of development projects, such as the World Bank, the International Finance Corporation, the Multilateral Investment Guaranty Agency, as well as regional development banks, such as the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development or the Inter-American Development Bank. When no distinction is made in the Guide, the word “lenders” includes international financial institutions providing loans to the project.

6. Turnkey contract

24. The Guide uses the term “turnkey contract” to refer to a construction contract whereby a single contractor is engaged to perform all obligations needed for the completion of the entire works, i.e. the transfer of the technology, the supply of the design, the supply of equipment and materials, the installation of the equipment and the performance of the other construction obligations (such as civil engineering and building). In a turnkey contract, the contractor is normally obliged to undertake all necessary works so that the purchaser receives a facility which is ready for being put to operation.

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CHAPTER II. PARTIES AND PHASES OF PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

A. General remarks

1. The following sections discuss basic issues such as private-sector participation in public infrastructure projects and the concept of project finance, identify the main parties to those projects and their respective interests, and briefly describe the evolution of a privately financed infrastructure project. These sections are conceived as general background information on matters that are examined from a legislative perspective in the subsequent chapters of the Guide.

B. Private sector and public infrastructure

2. The construction and operation of infrastructure facilities that are used by the general public or that deliver certain commodities to the general public has traditionally been undertaken by the State or by entities with a special status under national law. Entities operating public infrastructure facilities are often regarded as providers of “public utilities” or “public services”, although the notions of “public utilities” or “public services” have evolved over time and vary widely among States. In some countries most types of infrastructure have remained primarily the public sector’s responsibility, while in a number of countries private entities have been allowed to invest in infrastructure connected to some form of “public service” or “public utility”. Where private sector investment in infrastructure is allowed, it may require a governmental authorization sometimes called “licence”, “franchise” or “concession”.

3. During the nineteenth century, large investments were made by the private sector in the infrastructure and public utilities of many countries under various types of concessions. Significant portions of the world’s railways, electricity and telecommunications networks were originally developed by the private sector. In some countries, concessionaires were given an exclusive right to develop and operate infrastructure facilities and to establish rules for their use by the public, while elsewhere the State retained some form of regulatory control in that respect.

4. Private investment in infrastructure declined significantly in the course of the twentieth century, when the execution of large-scale projects was largely undertaken by governmental entities and financed with public funds or debt in the form of loans obtained from national or foreign banks or international financial institutions. In
some countries, this trend was accompanied by an expansion of the notions of "public services" or "public utilities" so as to cover a number of activities thus far carried out by the private sector. Special public entities were often established by national Governments and were given exclusive concessions within given territories.

5. A different development has taken place in recent years, as budgetary and financial constraints faced by the public sector in both developing and developed countries have led a number of States to devise alternatives to public funding for meeting expanding demands for infrastructure projects. Private sector financing is being increasingly called upon for the development of public infrastructure, and in some countries it has become an integral part of governmental programmes for the modernization or expansion of infrastructure. A variety of alternative arrangements for infrastructure development has evolved, ranging from transactions where the infrastructure is built and operated by private entities for an agreed period, but is eventually transferred to the Government, to situations where the infrastructure is privately owned and operated.

6. The large scale of modern infrastructure projects, complex financing techniques and the multiplicity of parties involved make infrastructure projects considerably more elaborate than traditional privately financed infrastructure projects. Modern privately financed infrastructure projects are usually developed under the "project finance" modality, which is briefly examined below.

C. The concept of project finance

7. "Project finance" is a financing modality in which the repayment of loans taken by the borrower is primarily assured by the revenue generated by the project, rather than by other guarantees given or obtained by its sponsors. To that end, the project's assets and revenue, and the rights and obligations relating to the project, are independently estimated and are strictly separated from the assets of the project sponsors. Due to the absence or limited role of personal guarantees or securities provided by the project sponsors, project finance is said to be "non-recourse" or "limited recourse" financing.

8. Debt capital usually represents the main source of funding for infrastructure projects implemented under the project finance modality. It is obtained in the financial market primarily by means of loans extended to the project sponsors or the project company by commercial banks, typically using funds which originate from short to medium-term deposits remunerated by those banks at floating interest rates. Consequently, loans extended by commercial banks are also subject to floating interest rates and have normally a maturity term shorter than the project period. The risks to which the lenders are exposed in project finance are considerably higher than in traditionally secured transactions, even more so in the case of infrastructure projects where the security value of the physical assets involved (e.g. a road, bridge or tunnel) would rarely cover the total financial cost of the project, given the lack of a "market" where such assets could be easily realized. Therefore, lenders are seldom ready to commit the large amounts needed for infrastructure projects solely on the basis of a project's expected cash flow or assets. Indeed, infrastructure projects are often financed on a basis which, while primarily relying on the project's cash flow and assets, with recourse to the project company, reduces the lenders' exposure by incorporating a number of back-up or secondary security arrangements and other means of credit support provided by the host Government, project sponsors, purchasers or other interested third parties.

9. In addition to debt, capital is also provided to infrastructure projects in the form of equity. Equity capital is obtained in the first place from the project sponsors or other individual investors interested in taking stock in the project company. However, such equity capital normally represents only a portion of the total cost of an infrastructure project. In order to obtain commercial loans or to have access to other sources of funds to meet the capital requirements of the project, project sponsors and individual investors have to offer priority payment to the lenders and other capital providers, thus accepting that their own investment will only be paid after payment of those other capital providers. Therefore, project sponsors, as the main promoters of the project, assume the highest financial risk. At the same time, projects sponsors will hold the largest share in the project's profit, once the initial investment is paid.

10. Other complementary sources of equity capital may include investment funds and other so-called "institutional investors" such as insurance companies, mutual funds or pension funds. These institutions normally have large sums available for long-term investment and may represent an important source of additional capital for infrastructure projects. They may provide capital in the form of debt or equity participation via investment funds. Normally, institutional investors do not participate otherwise in the development of the project or the operation of the facility. Their main reasons for accepting the risk of providing capital to infrastructure projects are the prospect of remuneration and the interest in diversifying investment.

D. Parties to the project

1. The host Government

11. For a number of reasons, the host Government plays a crucial role in the execution of privately financed infrastructure projects. The host Government normally identifies the project pursuant to its own policies for infrastructure development, establishes its specifications and conducts the process that leads to the selection of the project sponsors. Furthermore, throughout the life of the project, the host Government may need to provide various forms of support — legislative, administrative, regulatory and sometimes financial — so as to ensure that the infrastructure is successfully built and adequately operated. Finally, in a typical "build-operate-transfer" project, the host Government becomes the ultimate owner of the facility.
12. The host Government has a legitimate interest in ensuring that the project is properly executed and that the construction works meet the specifications. Thus, national laws often spell out in some detail the right of the Government to monitor the execution and operation of the project, a task that might involve governmental officials at different offices and ministries, and which requires an adequate level of coordination among them. For that purpose, some countries have found it helpful to appoint a specific agency, committee or officer invested with the authority to coordinate all monitoring procedures in connection with the project.

13. The host Government also has an interest in receiving high quality infrastructure that will benefit the national economy by the provision of needed goods (e.g. electricity, gas, services (e.g. water treatment, waste removal) or the facilitation of transport and trade (e.g. harbours, roads, tunnels). Additionally, the host Government might be interested in creating employment opportunities for local workers, or gaining advanced technology related to the project. Those objectives are often reflected in the pertinent legislation in provisions concerning technology transfer or preferences for companies that undertake to hire local personnel.

14. Another objective pursued by the host Government may be to achieve a more efficient management of public infrastructure, since private companies are believed to operate more cost-effectively than public entities. However, the host Government remains ultimately accountable for the project and will therefore be interested in ensuring that the infrastructure is operated in a manner consistent with the overall policy of the country for the sector concerned. Issues affecting the general public, such as quality of services and level of tariffs, are of particular concern for the host Government. Thus, the host Government may wish to retain the right to exercise some form of control over the operation of the project, sometimes through a special regulatory body.

2. Project sponsors and project company

15. The bulk of the investment in the project, in terms of money, supplies and labour, is made in the construction, expansion or renovation of the infrastructure. Thus, the group of project sponsors usually includes construction and engineering companies and suppliers of heavy equipment interested in becoming the main contractors or suppliers of the project. Those companies will be intensively involved in the development of the project during its initial phase, and their ability to cooperate with each other and to engage other reliable partners will be essential for a timely and successful completion of the works. However, by the very nature of their business, construction companies and equipment suppliers may not be at ease with a long-term equity participation in a project. Therefore, they will often seek to involve a company with experience in the operation and maintenance of the type of infrastructure being built. The presence of such a company may be encouraged by the host Government as an assurance that the technical feasibility and the financial viability of the project in all its phases, and not only during the construction period, have been adequately considered.

16. For the project sponsors it is important to have a return on their investment commensurate with the amount of risk they assume. Besides commercial aspects, such as the level of revenue that the project is expected to generate, the legal security afforded to investments in the host country will play an important role in the decisions of prospective project sponsors to invest in a given project. In particular, the sponsors will seek to obtain assurances that their investment will be protected from confiscation or dispossession; that they will be able to convert into foreign currency the revenue earned in local currency; and that they will be able to repatriate or take abroad their profits and residual investment after the expiry of the project term. They may, therefore, look for corresponding assurances from the host Government.

17. The desire to limit their liabilities to the amount of their equity investment normally leads the project sponsors to establish a limited liability company (such as a stock company) with juridical personality, assets and management of its own for the specific purpose of carrying out the project. Sometimes, the shareholders of the project company may also include "independent" equity investors not otherwise engaged in the project (usually institutional investors, investment banks, bilateral or multilateral lending institutions, sometimes also the host Government or a State-owned corporation). The participation of private sector investors from the host country is sometimes required by the national law.

18. The project company will have the overall responsibility for the project and will establish a number of contractual arrangements with construction contractors, equipment suppliers, the operation and maintenance company and other contractors, as required for the implementation of the project. The project company normally becomes the vehicle for raising the financial means required in addition to the equity contributed by the sponsors.

3. Lenders and international financial institutions

19. Due to the magnitude of the investment required for a privately financed infrastructure project, loans are often organized in the form of "syndicated" loans with one or more banks taking the lead role in negotiating the finance documents on behalf of the other participating financial institutions, mainly commercial banks. Commercial banks have considerable experience in project finance and, together with the project sponsors, they normally devise instruments that suit the needs of a particular project. Commercial banks are sensitive to the need for preserving the project company's payment capacity, and often show flexibility in respect of extensions of loans or renegotiation of their terms. At the same time, however, commercial banks insist on minimizing their exposure to completion, commercial, political or other project risks.

20. Before agreeing to finance the project, the lenders usually review carefully the economic and financial assumptions of the project so as to assure themselves of
its feasibility and commercial viability. Subsequently, arrangements will be made to limit as much as possible the risk of default. One is the priority payment of commercial debts before any other sources of capital are paid, i.e., before payments are made to other creditors or dividends are distributed to equity investors or project sponsors. Also, the lenders usually demand security in the form of mortgages, fixed or floating charges over all the assets of the project, assignments of future receivables arising from the operation of the project, automatic deposit of an agreed part of those proceeds into a blocked account (often outside the State where the project is located), governmental guarantees, or the ability to appoint a substitute in the event of default or inability of the project company to perform its obligations. The greater the amount of security the laws of the host country allow, the greater is the likelihood that financing will be available for the project at a more favourable rate. The possible role of national legislation in this respect is discussed in chapter VI, "The project agreement" [yet to be drafted].

21. International financial institutions and export credit agencies may also play a significant role in privately financed infrastructure projects. A number of projects have been co-financed by the World Bank, the International Finance Corporation, or by regional development banks. The participation of international financial institutions or export credit agencies may facilitate the project sponsors' task of raising funds in the international financial market by providing commercial banks with protection against a variety of political risks, including, *inter alia*, the failure of the host Government to make agreed payments, to make available sufficient foreign exchange or to grant necessary regulatory approvals. International financial institutions may also play an instrumental role in the formation of "syndications" for the provision of loans to the project. Some of those institutions have special loan programmes under which they become the sole lender of record to a project, acting on its own behalf and on behalf of participating banks and assuming the responsibility for processing disbursements by participants and for subsequent collection and distribution of loan payments received from the borrower.

4. Other capital providers

22. Capital providers other than commercial banks and international financial institutions may include "institutional investors," such as insurance companies, mutual funds, pension funds or investment funds. Under the terms of their investment, those other capital providers are usually entitled to priority payment of principal and interest, or priority dividend payment, before dividends are distributed to the project sponsors and other shareholders of the project company. They will often have the right to receive periodic reports and financial statements. In the case of institutional investors holding preferential shares or debentures, they will enjoy other rights available to them under the laws of the country where the project company is established or where the shares or debentures were issued, which may include any of the following: the right to be collectively represented by an agent; the right to be consulted on and to approve certain changes in the statutes of the project company; a preferential right to amounts distributable on liquidation.

23. One additional group of potential capital providers may be Islamic financial institutions. Those institutions operate under rules and practices derived from the Islamic legal tradition. One of the most prominent features of banking activities under Islamic rules is the absence of interest payments, and consequently the establishment of other forms of consideration for the borrowed money, such as profit sharing or direct participation of the financial institutions in the results of the transactions of their clients. As a consequence of their operating methods, Islamic financial institutions may be more inclined to considering direct or indirect equity participation in a project than other commercial banks. At the same time, Islamic financial institutions would give emphasis to reviewing economic and financial assumptions of projects for which financing is sought and would follow closely all phases of its implementation.

5. Construction contractors and suppliers

24. Often one or more of the companies that conclude contracts with the project company for the construction of the infrastructure facility or the supply of equipment are also sponsors of the project.

25. The construction contractor or contractors will usually assume responsibility for the design of the facility and caretaking of it through all stages of construction until its physical completion. Their main interest will be to be able to complete the works within the agreed schedule and within the original cost estimate. So as not to incur delay in the construction works, the contractors will desire access to necessary supplies (e.g., cement, fuel, steel, electricity, water) and will seek assurances that they will be allowed to import into the country all equipment and materials they might require. They will also be concerned with their ability to hire local and international personnel of their choice. Like the project company, the foreign construction contractors and suppliers will expect to be able to convert into foreign currency and transfer abroad any revenue earned in local currency.

6. Operation and maintenance company

26. Among all contractors retained by the project company, the contractor or contractors responsible for the operation and maintenance of the infrastructure facility are the ones with the longest lasting involvement in the project. The operating company in particular will be in a singular position, as the task of operating the facility will place it in direct relation with its customers and will expose the operating company to public scrutiny. For those reasons, the operating company's viewpoint as regards the assessment of the economic and financial viability and profitability of the project may differ from the viewpoint of the other project sponsors and, therefore, it may be valuable to obtain the input of the prospective operating company at the early stages of the project.
27. Possible methods of paying for the operation and maintenance of the infrastructure may vary from lump-sum payments to cost-plus methods, in which the variable portion above and beyond the recovery of costs may be either a fixed sum, a percentage of the cost or a share in the revenue of the project. Combinations of any of those methods are also common. The project company will normally establish some form of control mechanism over the operation of the facility (e.g., audit rights and cost review) so as to ensure that the operating costs are kept as much as possible within original estimates. Where the reimbursement of costs is subject to a maximum ceiling, the interest to reduce cost will be shared with the operating company.

28. The performance by the operation and maintenance company is normally subject to standards of quality that may derive from many different sources, including the law, the project agreement, the operation and maintenance contract or the instructions or guidelines issued by the competent regulatory body. In addition to that, a number of other requirements may be contained in legislation such as labour or environmental law. The operation and maintenance company is thus usually required to provide performance or surety bonds, and to purchase and maintain adequate insurance, including casualty insurance, workmen’s compensation insurance, environmental damage and third party liability insurance.

29. The operation and maintenance company will need clear operating requirements and regulations and will seek to obtain assurances from the project company or the host Government that it will be able to operate and maintain the facility without undue interference. Potential conflicts with the host Government may arise as a result of changes in national laws or regulations that impose higher standards for the operation of the facility, or in the course of the exercise by the Government of its monitoring rights.

30. Privately financed infrastructure projects involve a variety of risks pertaining to the construction and operational phases of the project and which may well exceed the capacity of the project company, the host Government, the lenders or the contractors, to absorb. Thus, obtaining adequate insurance against such risks is essential for the viability of a privately financed infrastructure project. Typically, an infrastructure project will involve casualty insurance covering its plant and equipment, third party liability insurance, and workmen’s compensation insurance. Other possible types of insurance include insurance for business interruption, interruption in cash flows, and cost overrun insurance. Those types of insurances are usually available at the commercial insurance markets, although the availability of commercial insurance may be limited for certain force majeure risks (e.g., war, riots, vandalism, earthquakes, hurricanes) which one or more of the parties will need to absorb. For some categories of risks, such as political risks, the project may require guarantees provided by international financial institutions, such as the World Bank or the International Financial Corporation, or by export credit agencies.

31. Privately financed infrastructure projects evolve through a number of phases from the initial identification of the project and the selection of the project sponsors, the conclusion of the project agreement and related instruments, the execution of the construction or modernization works to the operation of the infrastructure facility and possibly the transfer of the project to the host Government.

1. Identification of the project

32. With the possible exception of projects that result from unsolicited proposals by the private sector, it is normally the host Government that identifies projects to be carried out in order to meet the national needs for infrastructure development. From a legislative perspective, two important questions for the development of the project will normally have to be considered at this early stage, namely, what type of private sector involvement is sought for the project and who is authorized to act on behalf of the host Government.

33. One of the initial steps taken by the host Government in respect of a proposed infrastructure project is to conduct a preliminary assessment of its feasibility, including economic and financial aspects such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility. It is also important at this stage to assess the technical feasibility of the project as well as its environmental impact. The preliminary conclusions reached by the host Government at this stage will play a crucial role in conceiving the type of private sector involvement that is sought for the implementation of the project, for instance, whether the infrastructure facility will be owned by the host Government and temporarily operated by the private entity, or whether the facility will be owned and operated by the private entity. The choice of the modality of private sector participation will be significant for a series of legal issues commonly dealt with in the legislation, such as the procurement of land (see chapter V, “Preparatory measures”, paragraphs 1-15) and ownership of the infrastructure facility and related assets (see chapter VI, “The project agreement” [yet to be drafted]).

34. Following the identification of the future project, it is for the host Government to establish its relative priority and to assign human and other resources for its implementation. At that point, it is desirable that the host Government review existing statutory or regulatory requirements relating to the operation of infrastructure facilities of the type proposed with a view to identifying the main governmental bodies that have to give approvals, licences or authorizations or which have to be other-

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1This section discusses selected issues that arise in connection with different phases of a privately financed infrastructure project. For more information, including an analysis of economic, financial and management issues, the reader is advised to consult general literature on the subject, such as the UNIDO BOT Guidelines.
wise involved in the project. Depending on the importance and level of authority assigned to the project, the host Government, at that stage, may wish to designate an office or agency for the purpose of coordinating the input of other offices and agencies concerned and monitoring the issuance of licences and approvals (for further consideration of this issue, see chapter V, "Preparatory measures", paragraphs 38-44).

2. Selection of project sponsors

35. Once a project has been identified, its viability and feasibility have been assessed, and the need or interest for private financing have been confirmed, the host Government will turn to the selection of the project sponsors by using methods prescribed in the relevant legislation. Often, the selection method involves competitive tenders or proposals submitted by a selected number of candidates which have met the relevant prequalification requirements (for a discussion of legislative issues relating to the choice of a selection method and process, see chapter IV, “Selection of the project sponsors” [yet to be drafted]).

36. The confidence of prospective project sponsors in the viability of the project and their readiness to invest the time and funds required for preparing tenders or proposals is often influenced by their assessment of the rules governing the selection process. Prospective project sponsors might be discouraged to participate in a selection process that they perceive as unclear or cumbersome. Therefore, for Governments wishing to attract private sector investment in infrastructure it might be advisable to have procedures in place that maximize economy and efficiency in procurement, provide a fair and equitable treatment of all prospective project sponsors and ensure transparency in the selection process.2

37. Whatever method is chosen by the host Government, the selection process for infrastructure projects is often complex and might require considerable time and entail significant cost for prospective project sponsors, thus adding to the overall cost of the project. Ensuring that documents distributed to prospective sponsors are sufficiently clear and contain all elements necessary for the preparation of their tenders or proposals is important to reduce the need for clarifications, as well as minimize the potential for complaints or disputes. Furthermore, many Governments have found it useful to provide the prospective project sponsors with a sample of the project agreement to be entered into with the selected sponsors, so that they may familiarize themselves with the obligations normally assumed by a concessionaire under the laws of the host country. The legislation plays a significant role by providing guidance to the procuring entities in the host country as to essential elements to be taken into account in all selection processes concerning privately financed infrastructure projects.

38. Following the selection of the project sponsors, a number of measures will have to be taken with a view to beginning the implementation of the project. Often, the project sponsors will establish an independent legal entity to carry out the project, and with which the host Government will conclude a project agreement. The project agreement will set forth the obligations of the parties concerning the implementation of the project. For projects as complex as infrastructure projects, it is not unusual that several months elapse in negotiations before the parties are ready to sign the project agreement. A number of factors have been reported to cause delay in the negotiations, such as inexperience of the parties, poor coordination between different governmental agencies, uncertainty as to the extent of governmental support, or difficulties in establishing security arrangements acceptable to the lenders.3 A significant contribution may be made by the host Government by ensuring appropriate coordination between all offices and agencies involved, or by identifying in advance the types of guarantees and facilities it may provide to the implementation of the project (see chapter VII, “Government support” [yet to be drafted]). The clearer the understanding of the parties as to the matters to be provided in the project agreement, the greater the chances that the negotiation of the project agreement will be conducted successfully. Conversely, where important issues remain open after the selection process and little guidance is provided to the negotiators as to the substance of the project agreement, there might be considerable risk of costly and protracted negotiations. The legislation may help the parties to achieve a timely conclusion of the project agreement by identifying essential issues that need to be dealt with therein (for further discussion of this topic, see chapter VI, “The project agreement”).

39. In addition to the conclusion of the project agreement and related instruments, the project company will also enter into agreements with the lenders for the provision of loans for the implementation of the project and will establish contractual arrangements with contractors and suppliers. Moreover, a number of other arrangements are usually made in the period immediately following the award of the project in preparation for the commencement of the construction. Preliminary inspections of the site of the project will take place prior to the construction. The project company may also have at this stage to bring in the country the equipment and other material, as well as the personnel required for the execution of the project. Where licences are required, the host Government will be instrumental in avoiding unnecessary delays (see chapter V, “Preparatory measures”).

4. Construction phase

40. Following the satisfactory completion of the preliminary arrangements referred to above, funds may be dis-
bursed for the implementation of the project and the construc-
tion or modernization works may begin. It is during
the construction phase that most of the investment is
made in the project, at a time when no revenue is yet
generated by the infrastructure facility. That, the overall
financial viability of the project is largely predicated
upon a successful construction phase. Delays in the con-
struction and cost overruns are the two main reasons of
concern for all the parties involved. The lenders will
insist that those risks be assumed by the project company
and its contractors, of whose competence and reliability
they will wish to be assured.

41. From the perspective of the host Government, delay
and cost overruns also carry negative political implications
and may undermine the credibility of the host Gov-
ernment's policy on privately financed infrastructure
projects. The host Government usually requires the
project company to assume full responsibility for the
timely completion of the construction. Therefore, a
number of provisions will be made in the project agree-
ment, sometimes pursuant to a statutory requirement, so
as to deal with the possible consequences of those situa-
tions, such as provisions on performance bonds or sure-
ties, insurance requirements, or penalties and liquidated
damages. Possible legislative approaches to dealing with
these issues are considered in chapter X, "Performance
issues". Furthermore, the host Government, as well as the
lenders, will want to be assured that the technology pro-
posed for the implementation of the project has been
sufficiently used and is of proven safety and reliability.
They will consider with great caution any suggestion to
use new or untested technologies. In any event, a number
of tests may be required to be performed prior to final
acceptance of the infrastructure facility.

42. Completion and cost-overrun risks will normally
be allocated by the project company to the construction
contractors and, for that purpose, the construction con-
tract will normally be a fixed-price, fixed-time turnkey
contract with guarantees of performance by the contrac-
tors. The contract may require the construction contractor
to provide warranties that the infrastructure facility
will operate to predetermined performance standards.
Also, the equipment suppliers may be asked to provide
extensive warranties at to the fitness of the technology
provided.

5. Operational phase

43. After completion of the construction works, and
upon authorization by the host Government for the opera-
tion of the facility, begins the longest phase of the
project. During that phase the project company under-
takes to operate and maintain the infrastructure facility
and to collect revenue from the users. Conditions for the
operation and maintenance of the facility, as well as
quality and safety standards, are often provided in the law
and spelled out in detail in the project agreement. In
addition to that, a regulatory body may exercise an over-
sight function over the operation of the facility, as further
discussed in chapter IX, "Operational phase".

44. For the project company, the revenue generated by
the infrastructure facility is the sole source of funds for
repaying its debts, recouping its investment and making
profit. Therefore, one of the main concerns of the project
company during the operational phase is to avoid as much
as possible any interruption in the operation of the facility
and to protect itself against the consequences of any such
interruption. In this respect, the interests of the lenders
will normally be convergent with those of the project
company. Therefore, it will be important for the project
company to ensure that supplies and power needed for the
operation of the facility will be constantly available.
Also, the project company will be concerned that the
exercise by the host Government of its monitoring or
regulatory powers does not cause disturbance or interrup-
tion in the operation of the facility, nor that it results in
additional costs to the project company.

45. In general, the host Government, too, will be inter-
ested in ensuring the continuous provision of services or
goods to the users and customers of the infrastructure
facility. At the same time, however, the host Government
will also have a legitimate interest in ensuring that the
operation and maintenance of the facility are performed
in accordance with the applicable quality and safety
standards or operating rules and conditions. These aspects
will be of particular concern for the host Government in
respect of infrastructure facilities open to use by the gen-
eral public (such as a bridge or tunnel) or of a hazardous
nature (such as power plants or gas distribution facilities).
The particular perspective of the host Government, which
results from its being accountable to the public for the
infrastructure facility, may lead to conflicts or disagree-
ments with the project company. Thus, the importance of
having in place clear rules concerning the operation of
the infrastructure facility and of establishing adequate
methods for settling disputes between the host Govern-
ment and the project company that might arise at that
phase of the project.

6. Termination of the project

46. With the possible exception of those cases where the
infrastructure facility is to be permanently owned by the
project company, most privately financed infrastructure
projects are undertaken for a certain period. In some
projects, extensions of the project period in favour of the
same project company may be possible; in other cases,
the law requires instead the selection of a new concessionaire
through a competitive method (a more
detailed discussion of these issues is contained in chapter
XI, "Expiry, extension and early termination of the
project agreement").

47. In yet other projects, such as "build-own-operate"
projects, the infrastructure facility and all related assets
and equipment is transferred to the host Government at
the end of the project term. In those cases, the host Gov-
ernment will be interested in ensuring that modern tech-
nology has been transferred, that the infrastructure facil-
ity has been properly maintained, and that national
personnel has been adequately trained for the operation of
the facility.
CHAPTER V. PREPARATORY MEASURES

A. The project site

1. Acquisition of land for the construction of the facility

1. One of the essential preparatory measures for the execution of an infrastructure project is the acquisition of the land and other property necessary for the construction of the infrastructure facility. Often such land is provided by the host Government, but sometimes it is purchased by the project sponsors. In either case, the legislation of the host country may play an important role in facilitating the acquisition of the required land, thus helping to expedite the implementation of the project.

2. Where a new infrastructure facility is to be built on land owned by the host Government, or an existing infrastructure facility is to be modernized or rehabilitated (such as in "modernize-operate-transfer" or "rehabilitate-operate-transfer" projects), it will normally be for the host Government, as the owner of such land or facility, to make it available to the project company. The host Government may either transfer to the project company title to the land or facilities, or retain title thereto, while granting the project company a right to use the land or facilities and built upon it, a question which is considered below in chapter VI, "The project agreement" [yet to be drafted].

3. A number of countries have extensive provisions on the preservation and protection of State property, including special procedures and authorizations required for transferring the title to such property to private entities or granting to private entities the right to use governmental property. Whatever choice is made by the host Government regarding the ownership of the infrastructure facility to be built, modernized or rehabilitated, it might be desirable for the law to include an authorization to the host Government to transfer or make available to the project company any land or existing infrastructure required for the execution of the project.

4. Both in cases where the infrastructure facility is to be transferred back to the host Government or is permanently owned by the project company, the parties might be interested in establishing the value and the condition of such land and facility at the time it is handed over to the project company. Therefore, in addition to matters which would be typically dealt with in the project agreement (e.g. procedures for handing over the land or facilities, documentation required, stamp duties), it might be useful for the law to require that such land and existing facility be inspected, measured and demarcated prior to being transferred or made available to the project company. An example of a possible provision to that effect, combined with an authorization for the host Government to transfer land to the project company, might be drafted along the following lines:

   1. The Government is authorized to make available to the concessionaire the land, buildings or other property required for the execution of the project for the duration of the concession period.

5. The situation may become more complex in the case of new infrastructure facilities to be constructed on land that is not already owned by the host Government and that needs to be purchased from its owners. National legislation often provides that the host Government is to acquire the land and make it available for the purposes of the project, although in some cases the necessary land may be purchased by the project sponsors.

6. Acquisition of land by the project company might be used for the development of projects that originate from an unsolicited proposal from the private sector. Particularly in the case of infrastructure facilities of relatively high commercial potential that are not deemed to be a national priority, the host Government might be reluctant to assume the responsibility for purchasing the land and make it available to the project company. However, the host Government may still play an important role by assisting the project company to obtain approvals and licences for owning such land, or waiving restrictions or prohibitions, possibly of a legislative nature, that might exist to its ownership by the project company.

7. In most cases, however, the project company will be reluctant to assume the responsibility for purchasing the land needed for the project. The project company may fear the potential delay and expense entailed by having to negotiate with possibly a large number of individual owners and, as necessary in some parts of the world, to undertake complex searches of title deeds and review of chains of previous property transfers so as to establish the regularity of the title of individual owners. Furthermore, publicity concerning the planned infrastructure may raise the price of the land, so that the final sum paid by the project company may exceed its original cost estimate. In the case of projects identified by the host Government, there may also be a national interest in avoiding unnecessary delay or increase in the project cost as a result from the acquisition of land for the construction of the facility.

8. With a view to eliminating the above-mentioned difficulties, the host Government may be willing to assume the responsibility for providing the land required for the implementation of the project, either by purchasing it from its owners, or by acquiring it through expropriation. A number of countries have specific legislation governing expropriation procedures, which might be applicable to expropriation required for privately financed infrastructure projects. In some countries there may be different types of expropriation procedures depending on their purpose. Although the conditions and procedures for expropriating private property vary greatly in legal systems, the procedure often entails at least two distinct phases.

9. The need for expropriating the property may be established at an initial phase, when the intention of the
Government to expropriate the property in question is also made known to the owners or purported owners. In some countries, the host Government may be required to attempt to purchase the property from its owners, prior to resorting to compulsory measures. In other countries such limitations may not exist. In a number of countries, the Government is required to give notice of its intention to expropriate the property to the owner or to the general public by a special act of the Government, as a necessary condition for proceeding with the expropriation. The act that gives such notice is known under different expressions in different legal systems, such as "condemnation decree", or "declaration of public utility". For convenience purposes, such an act is referred to hereafter as "expropriation decree".

10. The issuance of such an act is often followed by a second phase, during which the compensation due to the owner is estimated and paid. In some countries, the entire expropriation procedures are carried out by the administration, while in other countries the second phase of the expropriation procedures takes the form of a court action. Often the Government will not own the property and will not be authorized to take possession of it unless and until appropriate compensation has been paid to the owners of the property. However, under certain circumstances, such as emergency situations or compelling public need, some laws authorize the court or other authority presiding over the expropriation to authorize the Government to take possession of the property immediately after the opening of the proceedings, often subject to the deposit of a sum commensurate with the value of the property.

11. The right to expropriate private property is usually vested in the Government, but the laws in a number of countries also extend that right to other entities, in addition to the Government. The laws in a number of countries authorize non-governmental entities carrying out certain activities, such as public utility undertakings or concessionaires of public services (e.g. railway companies, electricity authorities, telephone companies), to perform certain actions for the expropriation of private property required for providing or expanding their services to the public. However, some involvement of the Government is still required. For example, the law may provide that the Government has to issue the expropriation decree, while the concessionaire remains responsible for all subsequent steps of the expropriation procedures, including the payment of compensation to the owners.

12. Expropriation procedures are ordinarily lengthy and complex. They may also involve a number of officials at different ministries or levels of Government. Particular delay may be encountered in some countries where the expropriation takes the form of court proceedings. The host Government might thus wish to review existing provisions on expropriation for reasons of public interest with a view to assessing their adequacy to the needs of large infrastructure projects and to determining whether such provisions allow quick and cost-effective procedures, with due consideration to the rights of the owners.

13. In countries where the law contemplates more than one type of expropriation proceedings, it was found desirable to provide that all expropriations required for privately financed infrastructure projects are to be carried out pursuant to the more expeditious of those proceedings, such as the special proceedings that in some countries apply in emergency situations or for reasons of compelling public need. In some countries it was also found useful to make use of the possibility given by their laws to delegate to the concessionaire the authority to carry out the expropriation, while the host Government remained responsible for accomplishing those acts that, under the relevant legislation, are legal requirements for initiating expropriation proceedings (see paragraph 9, above.). Making use of that possibility might be advantageous for both the host Government and the project company, particularly in those countries where the award of compensation to the owners of the property expropriated is adjudicated in court proceedings, when the parties expect that the concessionaire might be able to handle those proceedings more expeditiously than the host Government. The parties may agree that the entire cost of the expropriation be borne by the project company, or that the host Government will bear some of that cost.

14. Measures such as those mentioned in the preceding paragraph might enable the execution of the project to begin soon after the project award, instead of having to await a final settlement of the question of compensation payable to the owners. For that purpose, in countries where those measures are possible under the relevant legislation, specific laws on privately financed infrastructure projects might contain only essential provisions and refer to other legislation, as exemplified in the following set of provisions:

1. Except as otherwise provided herein, the expropriation of private property required for the construction of an infrastructure facility pursuant to this law shall follow the procedures provided in the [identify the laws governing expropriation procedures].

2. The Government shall be responsible for issuing the [expropriation decree] [and performing other acts that are required under the law for the expropriation of the property].

3. The Government may authorize the concessionaire to carry out the expropriation, in which case [option 1: the concessionaire shall bear all the costs associated with the expropriation procedure] [option 2: the project agreement shall establish the respective obligations of the Government and the concessionaire in respect of the costs associated with the expropriation procedure] including the payment of compensation arising out of such expropriation, attorney's fees and judicial costs.

4. The court or other competent authority may authorize the concessionaire to take possession of the property upon opening of the expropriation proceedings [and deposit of the value of the property].

15. Upon expropriation, title to the land is often vested in the host Government, although in some cases the law may authorize the host Government and the project company to agree on a different arrangement, taking into account their respective shares in the cost of expropriating the property (see chapter VI, "The project agreement" [yet to be drafted]).
2. Right of way and other easements

16. Besides the acquisition of property for the construction of the facility, there might be a need for ensuring the project company's access to such property, in cases where the location of the site of the project is such that access to it requires transit on or through the property of third parties. Such a right of transit is in national laws referred to by expressions such as "right of way". The nature of the project may also be such that it requires the project company to enter property belonging to third parties (e.g., to place fixed installations or cables or to provide services directly to its customers such as in distribution of gas, water, or electricity). Such rights to use another person's property or to do work on it are referred to by expressions such as "easements" or expressions of similar meaning. Hereafter, rights of way, easements and similar rights are generally referred to by the word "easement".

17. Easements usually require the consent of the owner of the property to which they pertain, unless such rights are provided by the law. Generally, there might be three possible ways for the project company to acquire easements: the project company might acquire them directly from the owners of the properties concerned; the host Government might acquire and transfer them to the project company; or the law may grant such rights directly to the project company.

18. The host Government in some cases may prefer to leave it for the project company to negotiate easements with the owners of property. In that case there might be no need for a legislative provision dealing with the matter, and the parties may provide in the project agreement that the project company alone would be responsible for acquiring such rights. The parties might find such a procedure to be feasible for projects where the scope of the easements would be limited to a certain number of previously identified properties adjacent to the project site. However, in other cases such a procedure might not represent an expeditious or cost-effective alternative, particularly where the company would need to acquire easements from multiple owners. Thus, the host Government might prefer to acquire and grant to the project company the necessary easements.

19. In cases where the project site is acquired by the host Government or the project company through expropriation, the question of easements might be dealt with in conjunction with the expropriation of the project site. The scope of the expropriation may thus be defined as covering, in addition to the project site, easements in other lands to the extent necessary for the execution of the project.

20. The precise nature of the easements required by the project company would often depend on the nature of the project. They may include the right to place signs on adjacent lands, in the case of roads or railways; the right to install poles or electric transmission lines above third parties' property in the case of electricity distributors; the right to install and maintain transforming and switching equipment; the right to trim trees that interfere with telephonic lines placed on abutting property. In the light of the diversity of possible easements required in different projects, the host Government may find it preferable not to define in more precise terms the scope of those easements, leaving it to be established for each project individually.

21. A general legislative authorization to establish easements, as required by the project through expropriation, and without limiting their scope, might be contained in a provision similar to the following:

In addition to the property required for the construction of the facility, the Government [the concessionaire] may establish easements in such other property, as are necessary for ensuring the access of the concessionaire to the facility as well as the erection or placement on or above such other property of such installations and appurtenances, and the maintenance thereof, as are required for the functioning of the facility and the delivery of its services.

22. A somewhat different alternative might be for the law itself to provide the type of easements given to the project company, without necessarily requiring the expropriation of the property to which such easements pertain. Such an approach might be used in respect of sector-specific legislation, where the host Government deems it possible to determine, in advance, what easements might be needed by the project company. For instance, a law specific to the power generation sector might grant the following easements:

The concessionaire shall have a right of cabling for the purpose of placing and operating basic and distribution networks on property belonging to third parties, which shall entitle the concessionaire to the following:

(a) to establish or place underground and overhead cables, as well as establish supporting structures and transforming and switching equipment mounted on them;

(b) to maintain, repair and remove any of the above installations;

(c) to establish a safety zone along underground or overhead cables;

(d) to remove obstacles along the wires or encroach on the safety zone.

23. However, under some legal systems, the project company might be under an obligation to pay compensation to the owner, as would have been due in the case of expropriation, in the event the nature of the easement is such that the use of the property by its owner is substantially hindered.

B. Establishment of the concessionaire

1. The concessionaire as a consortium

24. National legislation on privately financed infrastructure projects often contains provisions on the legal status of the concessionaire and deals with the question whether the concessionaire has to be established as an independ-
ent legal entity or whether the project may be awarded collectively to the selected project sponsors as project consortium. In a number of countries the law requires that the project company be established as an independent legal entity (see subsection 2, below), while in some countries the law authorizes the award of a project to a consortium formed by the project sponsors.

25. As understood in business practice, a consortium is a contractual arrangement whereby a group of enterprises undertakes to cooperate in carrying out a project without integrating into an independent legal entity. Consortia have been widely used in the construction industry for the development of large, capital-intensive projects requiring technical expertise in different fields. Consortia are commonly regarded as purely contractual arrangements which do not have a juridical personality of their own. However, there is no uniform legal regime governing consortia, which may fall under different contractual categories provided in national laws. Accordingly, the legal status of consortia and the rights and obligations of their members vary in different legal systems.

26. In the case of small-scale or short-term projects involving few sponsors, forming a project consortium may present some advantages, such as more flexibility in dealings among project sponsors and with their business partners than in the case of an incorporated joint venture. Avoiding double taxation may also be a reason for choosing not to establish an independent legal entity in the host country, in case there is no bilateral double taxation agreement between the host country and the country or countries where the foreign investors have their seats. However, for large-scale, long-term projects financed through non-recourse loans, a project consortium would not normally represent a viable alternative. A consortium would not be a suitable vehicle for borrowing funds, since in many jurisdictions the consortium members would have a residual and unlimited liability for the obligations of the consortium. Moreover, a consortium might not have access to the financial market for the purpose of raising funds, where only corporations are authorized by the law to issue negotiable instruments and securities such as stocks, bonds and debentures.

27. Also from the perspective of the host country it would normally be preferable that the project sponsors establish an independent legal entity in the country (see subsection 2, below). However, there might be instances where the host Government would wish to retain the possibility of engaging consortia for infrastructure projects, depending on the scale and nature of the project, or with a view to holding all project sponsors jointly liable for the entire project. For those countries, a decision about the desirable form of arrangement might need to be taken in the light of the characteristics of each particular project or type of infrastructure. For that purpose, the law might give the procuring entity the option to award the project to a consortium or to require that a separate legal entity be established by the selected group of sponsors, depending on the needs of the project. Should the procuring entity consider that there would be no need for requiring the establishment of the project company as an independent legal entity, the law could address coordination difficulties that might arise in dealing with a consortium and clarify the responsibilities of its members. The law might, for instance, require that one member of the consortium be designated as responsible for the project vis-à-vis the host Government, while providing that all the remaining members of the consortium remain jointly and severally liable to the host Government for the execution of the project. An example of a provision to that effect might be as follows:

1. Where consortia are allowed to submit tenders (proposals), the solicitation of tenders (request for proposals) may provide that the procuring entity has the option to require that, if selected, the consortium must establish an independent legal entity prior to the signature of the project agreement.

2. If the procuring entity does not require the establishment of an independent legal entity, it shall require the following:
   (a) Submission of written proof of the agreement establishing the consortium entered by all its members; and
   (b) The appointment of one of its members as the leader of the consortium, who shall be responsible to the Government for the execution of the project.

3. The appointment of a consortium leader is without prejudice to the joint and several liability of the remaining members of the consortium to the Government for the execution and operation of the project. The project agreement shall be signed by all the members of the consortium.

28. A provision such as the above might help clarify some of the more obvious disadvantages of retaining a consortium for the execution of a project. However, a number of issues would still need to be addressed in the project agreement, and extensive negotiations and detailed provisions might be required to ensure coordination among members of the consortium, adequate liaison with the host Government, as well as clarifying the extent of responsibilities and liabilities of each of the members of the consortium for the execution of the project.¹

2. The concessionnaire as an independent legal entity

29. In most cases, the law requires that the concessionnaire be an independent legal entity which has to be incorporated prior to, or immediately after, the

¹ A brief discussion of issues arising out of contracting construction works with a non-integrated group of enterprises is contained in the UNCITRAL Construction Legal Guide (chapter II "Choice of Contracting Approach", paras. 9-16). Some of the issues mentioned therein might also apply, mutatis mutandis, to negotiations concerning privately financed infrastructure projects, including the following: how the difficulty of bringing a claim against project sponsors from different countries, should a dispute arise, may be overcome; how the dispute settlement clause may be formulated so as to enable any dispute between the host Government and several or all the members of the consortium to be settled in the same arbitral or judicial proceeding; how guarantees to be given by third parties as security for performance and quality guarantees to be given by members of the consortium are to be structured; what ancillary agreements may have to be entered into by the Government; whether there are any mandatory rules of the applicable law governing an agreement with an unincorporated joint venture.
award of the project. Sometimes the law contains more detailed provisions concerning matters such as minimum capital, corporate form and purpose.

30. A project company established as an independent legal entity in the host country is for a number of reasons the structure normally used for infrastructure projects. It is relatively simple to vest all rights, assets and obligations related to the project in a single independent legal entity. Under such a model, the direct involvement of other parties such as the project sponsors may be limited, and the project company will enter into the project agreement and other instruments in its own name and will have its own personnel and management. An independent legal entity may also provide a mechanism for protecting the interests of the project, which may not necessarily coincide with the individual interests of all of the project sponsors. This aspect may be of particular importance for projects in which significant portions of the required services or supplies are to be provided by project sponsors. Since a substantial part of the liabilities and obligations of the project company, including long-term ones (project agreement, loan and security agreements, construction contracts), are usually agreed upon at an early stage, the project may benefit from being independently represented at the time those instruments are negotiated. Furthermore, a project company established as an independent legal entity allows a clear separation between the assets, proceeds and liabilities of the project and those of the project sponsors, thus facilitating accounting and auditing procedures.

31. One matter often dealt with in legislation on privately financed infrastructure projects concerns the equity investment required for the establishment of the project company. The host Government has a legitimate interest in seeking an equity level that assures a sound financial basis for the project company and guarantees its capability to meet its obligations. Such interest may be satisfied by requiring that the project company be established with a certain minimum capital. In some countries, that issue is dealt with in the law itself, by prescribing a fixed sum or establishing a percentage of the total project cost as the minimum capital of the project company. In other countries, these issues are not addressed in the legislation and are left for the procuring entity to decide, sometimes after negotiations with the project sponsors.

32. The total investment needed as well as the ideal proportion of debt and equity capital vary from project to project so that it would normally be difficult to establish a fixed sum or percentage that would be adequate for all instances. Thus, a legislative requirement of fixed sum as minimum capital for all companies carrying out infrastructure projects in the country may be excessively rigid. A more flexible approach might be to establish individual requirements taking into account the particular circumstances of each project or type of infrastructure. Where the total expected cost of the project cannot be estimated in advance by the procuring entity, the minimum capital required for the establishment of the project company could be indicated in the solicitation of tenders or request for proposals. Where it is not feasible to estimate in advance the project cost, or in the event the host Government prefers to negotiate the amount or ratio of equity investment offered by the project sponsors, the procuring entity might prefer to have the flexibility to arrive at an adequate minimum capital in the course of the selection process. In countries where the project is awarded by a formal act of the host Government (such as a decree or notice of award (see chapter IV, "Selection of the project sponsors" [yet to be drafted]), the required minimum capital of the project company could then be indicated in such act.

33. In addition to the question of minimum capital, national laws may contain provisions concerning the form under which the project company has to be organized. Some laws specifically require that the project company be incorporated as a certain type of company, while other laws make no provision on this subject. In cases where it is considered important to specify the form in which the project company is to be established, it is desirable to bear in mind the project sponsors’ interest in ensuring that their liability will be limited to the amount of their investment. In order to avoid a subsidiary liability for payment of the project company’s debts, the project sponsors will normally prefer to establish the project company as a limited liability company, such as a joint stock company. Project sponsors would be reluctant to carry out a project that would require them to assume unlimited liability for the project company’s debts.

34. The issues discussed in the preceding paragraphs might be addressed by a provision such as the following:

1. The successful tenderer [proposer] shall, within [...] days from the award of the concession, establish the company with which the project agreement will be entered into.

2. The minimum capital, form, and duration of the project company shall be as provided in the solicitation of tenders [request for proposals] [notice of award of the concession].

35. Some laws contain provisions concerning the scope of activities of the project company, requiring, for instance, that the project company’s activities be limited to the development and operation of a particular project. Such restrictions might serve the purpose of ensuring the transparency of the project’s accounts and preserving the integrity of the project’s assets, by segregating each project’s assets, proceeds and liabilities from the assets, proceeds and liabilities of other projects or other activities not related to the project. Also, such a requirement may facilitate the assessment of the performance of each project since deficits or profits could not be covered with or set off against debts or proceeds from other projects or activities. At the same time, however, the host Government might be interested in reserving the possibility of integrating other projects under a common management, in the event the same project company is awarded a complementary project in a separate selection process. A possible provision establishing such a requirement but allowing for exceptions might be drafted as follows:

The purpose of the project company shall be limited to the execution and operation of the project for which the concession was awarded. Except as otherwise pro-
vided in the solicitation of tenders [request for proposals]. A separate company shall be established for carrying out each project.

36. The host Government might also be interested in ensuring that the statutes and by-laws of the project company will adequately reflect the obligations assumed by the company in the project agreement, or that they will not hinder the execution of the project. Therefore, the law may provide that changes in the statutes and by-laws of the project company require prior authorization by the host Government. In requiring governmental approval for modifications of the statutes and by-laws of the project company, it is desirable to weigh the public interests represented through the State against the need for affording the project company the necessary flexibility for the conduct of its business. The daily management of the project might be impaired if even minor questions concerning the company’s internal affairs routinely required prior governmental clearance. One possible solution might be to limit the possibility of the host Government objecting to a proposed amendment to those cases that concern provisions deemed to be of essential importance (e.g., amount of capital, classes of shares and their privileges, liquidation procedures) and which could be identified in the project agreement. The following is an example of a provision to that effect:

The statute and by-laws of the project company and any amendment thereto requires prior approval by the Government, which is deemed granted unless the Government refuses approval within [...] days. The Government may refuse to approve amendments concerning essential provisions of the statute and by-laws [as provided in the project agreement], when such amendments are not deemed to be in the public interest.

37. The host Government may have a legitimate interest in ensuring that the original project sponsors maintain their commitment to the project throughout its duration and that they will not be replaced by entities unknown to the host Government. Thus, the law may provide, in addition to the matters mentioned above, that the transfer of voting shares of the project company shall require the prior approval of the host Government.

C. Approvals and licences

38. In some countries, the entry into force of the project agreement is sometimes subject to the approval of the host Government or an act of parliament, or even the adoption of special legislation. For certain projects, approvals may be required at different levels of Government. The time required for obtaining such approvals varies greatly from country to country and in some cases may be considerable, particularly when the approving organs or officials were not originally involved in conceiving the project or negotiating its terms.

39. Delays in bringing an infrastructure project into operation may compromise its financial viability or cause considerable loss to its sponsors. Where the additional financial cost cannot be recovered by raising the tariffs or charging higher prices, the project company might turn to the host Government for redress or support. In both situations, the consequence might be an increase in the cost of the project and in its cost to the public. A possible denial of final approval to the project, or of another licence without which the project cannot be carried out, would have even greater consequences for the project sponsors. By the time the project agreement is signed, the project sponsors will normally have spent considerable time and invested significant sums in the project (e.g., preparation of feasibility studies, engineering design and other technical documents; preparation of tendering documents and participation in the tendering proceedings; preparation and negotiations of the contract documents and loan agreements; hiring consultants and advisers).

40. With a view to expediting matters and avoiding the adverse consequences of delays in the project’s timetable, in some countries the authority to bind the host Government is delegated in the relevant legislation to designated officials, so that the entry into force of the project agreement occurs upon signature or upon the completion of certain formalities, such as publication in the official gazette. In countries where such a procedure might not be feasible, or in which final approvals by another entity would still be required, it would be desirable to consider ways to avoid such approval requirements functioning as a deterrent for prospective project sponsors accepting to undertake projects in the country. It might be important to bear in mind that the risk of the project being frustrated by lack of approval might be too high for the project sponsors to assume. And that the host Government might be requested to provide sufficient guarantees to the project sponsors and the lenders against such risk. In some countries where those requirements exist, Governments have sometimes agreed in the project agreement to compensate the project sponsors for all costs incurred and to repay any outstanding loans, in the event the final approval of a project is withheld.

41. In addition to approvals required for the entry into force of the project agreement, the development and operation of infrastructure projects usually involve a number of licences or authorizations required under the laws of the host country in respect of various specific activities (such as licences under foreign exchange regulations; licences for the incorporation of the project company; authorizations for the employment of foreigners; registration and stamp duties for the use or ownership of land; importation licences for equipment and supplies; construction licences; licences for the installation of cables or pipelines; licences for bringing the facility into operation). Such licences and authorizations may fall within the competence of various organs at different levels of the national administration and the time required for their issuance may be significant.

42. Some countries have found it helpful to coordinate the issuance of licences at an early stage of the execution of the project by identifying in advance the licences that will be required for carrying out projects in specific sectors and providing that the procuring entity and the agency or agencies concerned with licensing the activity that is the object of the concession should agree on the
terms and conditions for granting such licences before
tenders are invited, such as in the following example:

1. Prior to issuing the solicitation of tenders [request
for proposals], the procuring entity shall, in consulta­
tion with other organs and agencies concerned, identify
all major licences and the agencies from which licen­
ces are to be obtained for setting up the project.

2. The current list of major licences required and the
agencies from whom they are to be obtained shall be
provided with the solicitation of tenders [request for
proposals].

43. A provision such as the above might be comple­
mented by a provision that entrusts one organ with the
authority to monitor the issuance of such licences, as in
the following example:

1. The [regulatory body for the sector concerned]
shall be responsible for receiving the applications for
licences, transmitting them to the appropriate agencies
and monitoring the issuance of all licences listed in the
solicitation of tenders and other licences that might be
introduced thereafter.

2. Licences are deemed to be granted unless they
are rejected in writing within [...] days of receipt of the
application.

44. However, there might be instances where the host
Government, for constitutional or other reasons pertain­
ing to its internal organization, might not be in a position
to assume responsibility for the issuance of all licences,
or to entrust one single body with such a coordinating
function. In that case, the host Government might wish to
consider providing some assurance that nevertheless it
will as much as possible assist the project company in
obtaining licences required by national law, such as by
designating an official or agency dedicated to provide
information and assistance to project sponsors regarding
the required licences to be obtained, as well as the
relevant procedures and conditions.
V. INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Explanatory notes by the UNCITRAL secretariat on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit

(A/CN.9/431 and Corr. 1) [Original: English]

INTRODUCTION


3. The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit is designed to facilitate the use of independent guarantees and stand-by letters of credit, in particular where only one or the other of those instruments may be traditionally in use. The Convention also solidifies recognition of common basic principles and characteristics shared by the independent guarantee and the stand-by letter of credit. In order to emphasize the common umbrella of rules provided for both independent guarantees and stand-by letters of credit, and to overcome divergences that may exist in terminology, the Convention uses the neutral term “undertaking” to refer to both types of instruments.

4. Independent undertakings covered by the Convention are basic tools of international commerce. They are used in a variety of situations, for example: to secure performance of contractual obligations including construction, supply and commercial payment obligations; to secure repayment of an advance payment in the event that such repayment is required; to secure a winning bidder's obligation to enter into a procurement contract; to ensure reimbursement of payment under another undertaking; to support issuance of commercial letters of credit and insurance coverage; and to enhance creditworthiness of public and private borrowers. Yet familiarity with one or the other instrument covered by the Convention is not universal, there is a wide absence of legislative provisions dealing with them, practices concerning the two types of instruments have differed in certain respects, and important questions confronting users, practitioners and courts in the daily life of these instruments are beyond the power of the parties to settle contractually.

5. By establishing a harmonized set of rules for the two types of instruments covered, the Convention will provide greater legal certainty in their use for day-to-day commercial transactions, as well as marshall credit for public borrowers. The Convention will also facilitate issuance of independent guarantees and stand-by letters of credit in combination with each other, for example, the issuance of a stand-by letter of credit to support the issuance of a guarantee, or the reverse case, with both undertakings capable of being subject to the same legal regime. The Convention will also facilitate “syndications”, which could, with the help of the Convention, more easily combine both types of instruments. That technique allows lenders to spread credit risk among the participants in the syndication, thereby enabling them to extend larger volumes of credit.

6. The Convention gives legislative support to the autonomy of the parties to apply agreed rules of practice such as the Uniform Customs and Practice for Document
The presentation of a demand for payment in the form, or one having to be accompanied by the other documents demand for payment. The demand may, depending upon the terms of the undertaking, be either a “simple” demand guarantor/issuer promises to pay the beneficiary upon a breach of a contract). It may be noted that another major types of instruments, which are payable upon presentation of any stipulated documents, are used to secure against the possibility that some contingency may occur (e.g. a breach of a contract). It may be noted that another major use in particular regarding the question of fraudulent or abusive demands for payment and judicial remedies in such instances. Furthermore, the reference to the Convention to the specific terms of independent guarantees and stand-by letters of credit, including any rules of practice incorporated therein, enables the Convention to work in tandem with rules of practice such as UCP and URDG.

7. It should be noted that, strictly speaking, an independent guarantee or stand-by letter of credit is an undertaking given to a beneficiary. Accordingly, the focus of the Convention is on the relationship between the guarantor (in the case of an independent guarantee) or the issuer (in the case of a stand-by letter of credit) (hereinafter referred to as “guarantor/issuer”) and the beneficiary. The relationship between the guarantor/issuer and its customer (the principal, in the case of an independent guarantee, or the applicant, in the case of a stand-by letter of credit, hereinafter referred to as “principal/applicant”) largely falls outside the scope of the Convention. The same may be said of the relationship between a guarantor/issuer and its instructing party (the instructing party being, for example, a bank, requesting, on behalf of its customer, the guarantor/issuer to issue an independent guarantee).

8. Provided below is a summary of the main features and provisions of the Convention.

I. SCOPE OF APPLICATION

A. Types of instruments covered

9. The scope of application of the Convention is confined to instruments of the type understood in practice as independent guarantees (referred to as e.g. “demand”, “first demand”, “simple demand” or “bank” guarantees) or stand-by letters of credit (article 2(1)). Those instruments can be covered by the umbrella of the Convention because they share a wide area of common use. Both types of instruments, which are payable upon presentation of any stipulated documents, are used to secure against the possibility that some contingency may occur (e.g. a breach of a contract). It may be noted that another major use in particular of stand-by letters of credit is as an instrument to effectuate payment of mature indebtedness (“financial” or “direct pay” stand-by letters of credit).

10. In the undertakings covered by the Convention the guarantor/issuer promises to pay the beneficiary upon a demand for payment. The demand may, depending upon the terms of the undertaking, be either a “simple” demand or one having to be accompanied by the other documents called for in the guarantee or stand-by letter of credit. The guarantor/issuer’s obligation to pay is triggered by the presentation of a demand for payment in the form, and with any supporting documents, as may be required by the independent guarantee or stand-by letter of credit. The guarantor/issuer is not called on to investigate the underlying transaction, but is merely to determine whether the documentary demand for payment conforms on its face to the terms of the guarantee or stand-by letter of credit. Because of this characteristic the instruments covered by the Convention are referred to commonly as being “independent” and “documentary” in nature.

11. Reflecting practice, various types of scenarios are envisaged in which an undertaking may be given, including at the request of the customer (“principal/applicant”), on the instruction of another entity or person (“instructing party”) acting at the request of the customer of the instructing party, or on behalf of the guarantor/issuer itself (article 2(2)).

12. Full freedom is given to the parties to exclude completely the coverage of the Convention (article 1), with the result that another law becomes applicable. Since the Convention, if it is applicable, is to a large extent suppletive rather than mandatory, wide breadth is given to exclude or alter the rules of the Convention in any given case.

B. Coverage of counter-guarantees and confirmations

13. The Convention is designed to include coverage of the “counter-guarantee”. A counter-guarantee is defined in the Convention (article 6(c)) in the same essential terms as the basic notion of “undertaking”, namely, as 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 (counter-guarantee).

14. Apart from this general treatment of counter-guarantees as “undertakings”, the Convention provides a specific provision on counter-guarantees in the context of fraudulent or abusive demands for payment, in that context counter-guarantees may raise questions distinct from those raised by other undertakings covered by the Convention (see paragraph 48, below).

15. The Convention also includes in its scope confirmations of undertakings, i.e. an undertaking added to that of, and authorized by, the guarantor/issuer. A confirmation gives the beneficiary an option of demanding payment from the confirmer as an alternative to demanding payment from the guarantor/issuer. By requiring authorization of the guarantor/issuer, the Convention does not recognize as confirmations “silent” confirmations, i.e. confirmations added without the assent of the guarantor/issuer.

C. Instruments outside scope of Convention

16. The Convention does not apply to “accessory” or “conditional” guarantees, i.e. guarantees in which the payment obligation of the guarantor involves more than the mere examination of a documentary demand for payment. Thus, the Convention does not annul or affect such other
The Convention will promote such uniformity by providing a definition of “independence” (article 3). That definition is phrased in terms of the undertaking not being dependent upon the existence or validity of the underlying transaction, or upon any other undertaking. The latter reference, to other undertakings, clarifies the independent nature of a counter-guarantee from the guarantee that it relates to, and of a confirmation from the stand-by letter of credit or independent guarantee that it confirms.

In addition, to fall within the scope of the Convention, an undertaking must not be subject to any terms or conditions not appearing in the undertaking. It is specified that, to fall within the Convention, an undertaking should not be subject to any future, uncertain act or event, with the exception of presentation of a demand and other documents by the beneficiary or of any other such act or event that falls within the “sphere of operations” of the guarantor/issuer. That is in line with the notion that the role of the guarantor/issuer in the case of independent undertakings is one of paymaster rather than investigator.

E. “Documentary” character of undertakings covered

As an adjunct to being “independent” from the underlying transaction, the undertakings covered by the Convention possess a “documentary” character. This means that the duties of the guarantor/issuer when faced with a demand for payment are limited to examining the demand for payment and any supporting documents to ascertain whether the demand and other documents submitted conform “facially” with what is called for under the terms of the independent guarantee or stand-by letter of credit. The effect of this rule is that undertakings possessing “non-documentary conditions” are outside the scope of the Convention. The only conditions which would not have to be documentary in nature would relate to acts or events within the sphere of operations of the guarantor/issuer. A simple example of the latter would be a determination by the guarantor/issuer as to whether a required monetary deposit had been made in a designated account maintained with that guarantor/issuer.

F. Definition of internationality

The Convention limits its application to undertakings that are international. Internationality is determined on the basis of the places of business, as specified in the undertaking, of any two of the following being in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer (article 4(1)). Special rules are provided for the case of an undertaking listing more than one place of business for a party, as well as for the case of a party not having a “place of business” as such, but only a habitual residence (article 4(2)).

II. INTERPRETATION

The Convention contains a general rule that interpretation of the Convention should be with a view to its international character and the need to promote uniformity in its application (article 5). In addition, interpretation is to have regard for the observance of good faith in international practice. Abstracts of any court decisions or arbitral awards applying and interpreting a provision of the Convention will be included in the case collection system called “CLOUT” (Case law on UNCITRAL texts).
A. Issuance

26. On the question of the point of time and place of issuance (i.e. when and where the obligations of the guarantor/issuer to the beneficiary become operative), the Convention promotes certainty in an area traditionally of some uncertainty due to the existence of differing notions. The Convention rule is that issuance occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer (e.g. when it is sent to the beneficiary) (article 7(1)). In addition, the Convention defines issuance in terms of its practical effect. Once issued, the undertaking is available for payment in accordance with its terms and is irrevocable.

27. As is customary in legal texts of UNCITRAL, the Convention establishes a flexible and forward looking form requirement for issuance. By requiring a form that preserves a complete record of the text of the undertaking, rather than referring to "written" form, the Convention accommodates issuance in a non-paper-based medium (e.g. by means of electronic data interchange). It does so by referring to issuance in any form that preserves a complete record of the text of the undertaking and provides a generally acceptable or specifically agreed means of authentication (article 7(2)).

28. The Convention does not deal with the question of capacity to issue undertakings (i.e. who is permitted to be a guarantor/issuer). That question, which raises regulatory or other legal implications that differ from country to country, is left to national law.

B. Amendment

29. Legislative recognition is given by the Convention to the rule of practice that amendment of an undertaking requires acceptance by the beneficiary in order to take effect, unless it is otherwise stipulated (article 8(3)). The Convention takes cognizance of the possibility that an amendment might be authorized in advance by the beneficiary. In such cases, the amendment takes effect upon issuance (article 8(2)).

30. In one of the few provisions of the Convention that directly addresses the relationship between the principal/applicant and the guarantor/issuer, it is made clear that an amendment has no effect on the rights and obligations of the principal/applicant, or for that matter of an instructing party or of a confirmer, unless such other person consents to the amendment (article 8(4)).

C. Transfer and assignment

31. The Convention reflects the distinction drawn in practice between, on the one hand, transfer to another person of the original beneficiary’s right to demand payment, and, on the other hand, assignment of the proceeds of the undertaking, if payment is made. In the case of assignment of proceeds, as contrasted with transfer, the right to demand payment remains with the original beneficiary, the assignee being given only the right to receive the proceeds of payment, if such payment occurs.

32. Regarding transfer, the Convention endorses the dual requirement, found in UCP, that the undertaking itself must state that it is transferable, and that, in addition, any actual transfer must be consented to by the guarantor/issuer (article 9). The rationale is that a change in the person who is to present the demand for payment and any accompanying documents may increase the risk assumed by the guarantor/issuer (e.g. if the guarantor/issuer would feel that the proposed transferee was less reliable or familiar than the originally designated beneficiary). For that reason guarantor/issuers are given the opportunity to consent to any given transfer.

33. Regarding assignment of proceeds, the beneficiary of the undertaking may, unless otherwise stipulated in the undertaking or elsewhere agreed, assign the proceeds (article 10(1)). If the beneficiary assigns the proceeds and if the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, payment to the assignee discharges the obligor, to the extent of its payment, from liability under the undertaking (article 10(2)).

D. Cessation of right to demand payment

34. The Convention gives legislative effect to notions of cessation of the right to demand payment that are widely followed in practice, though not yet universally recognized in national laws or judicial precedents. Under the Convention (article 11), the events that trigger cessation include: a statement by the beneficiary releasing the guarantor/issuer; a termination of the undertaking agreed by the guarantor/issuer; full payment of the amount stipulated in the undertaking, unless the undertaking provided for automatic renewal or increase of the amount available; expiry of the validity period of the undertaking. By affirming that the presentation of the demand for payment has to occur prior to the expiry of the undertaking, the Convention will help to overcome any remaining uncertainty as to that question.

35. A degree of uncertainty still surrounds, in some jurisdictions, the question of the effect of retention of the instrument embodying the undertaking as regards definitive cessation of the right to demand payment. The Convention, in line with what is regarded widely as the best practice, provides that in no case does retention of the instrument prolong the right to demand payment if the amount available has already been paid or if the undertaking has expired (article 11(2)). Apart from those two contexts, the parties remain free to stipulate a requirement of return of the undertaking in order to terminate the right to demand payment.

E. Expiry

36. The Convention provides (article 12) that the validity period of an undertaking expires in the following ways: at the expiry date, which may be a fixed date or the last day of a fixed period stipulated in the undertaking; if expiry is linked to the occurrence of an act or event, upon presentation of the document called for in the undertaking.
to indicate the occurrence of the act or event, or, if no such document is called for, by presentation by the beneficiary of certification for that purpose; or after six years from issuance, if no expiry date has been stipulated or if a stipulated expiry act or event has not occurred.

IV. RIGHTS, OBLIGATIONS AND DEFENCES

A. Determination of rights and obligations

37. The rights and obligations of the guarantor/issuer and the beneficiary are determined by the terms and conditions of the undertaking (article 13(1)). Express reference is made in the Convention to rules of practice, general conditions or usages (e.g. UCP, URDG) to which the undertaking is specifically made subject. This is in line with a main purpose of the Convention, to give legislative support to the right of commercial parties to incorporate such rules of practice, conditions or usages. That approach ensures that the Convention will remain a living instrument, sensitive to developments in practice, including future revisions of rules of practice such as UCP and URDG and the development of other international rules of practice.

38. The flexible linking of the Convention to the needs and evolving usages and standards of commercial practice is also referred to elsewhere in the Convention. For example, in the interpretation of the terms and conditions of an undertaking and in settling questions not addressed by the Convention, regard is to be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice (article 13(2)).

39. Similarly, the standard of conduct of the guarantor/issuer, based on good faith and the exercise of reasonable care, is to be defined by reference to generally accepted standards of international practice of independent guarantee and stand-by letters of credit (article 14(1)). While the Convention leaves open the possibility of stipulating a standard somewhat lower than the generally applicable standard of care, it clearly prohibits any exemption of the guarantor from liability for lack of good faith or gross negligence.

B. Demand by beneficiary

40. As regards the beneficiary, the process of demanding and obtaining payment involves presenting a demand for payment and any accompanying documents in accordance with the terms of the undertaking. In view of the documentary character of the demand, the form requirements of the Convention applicable to the undertaking itself (see paragraph 27, above) apply to the demand (article 15(1)). The place of presentation is at the counters of the guarantor/issuer at the place of issuance, unless some other place or person is stipulated for payment purposes (article 15(2)).

41. In addition, the Convention provides (article 15(3)) that by virtue of making a demand the beneficiary implicitly certifies that the demand is not made in bad faith, and that none of the circumstances exist that would justify non-payment in accordance with the provisions of the Convention on fraudulent or abusive demands for payment (see paragraphs 47 and 48, below).

C. Examination of demand and payment

42. The duty of the guarantor/issuer is to examine the demand and any accompanying documents to determine whether they are in facial conformity with the terms and conditions of the undertaking, and consistent with one another (article 16(1)). That determination is to have due regard to the applicable standard of international practice, a formulation that ensures that the Convention takes account of developments in practice as regards the notion of facial conformity.

43. In a provision expressly subject to variation by the terms of the undertaking, the guarantor/issuer is given a "reasonable time", up to a maximum of seven days, to examine the demand and to decide whether to pay (article 16(2)). Thus, what is deemed a "reasonable time" may well be less than seven days, but in no case more than seven days, unless some different period is stipulated. This takes into account that the time needed for examination of the demand would depend upon the nature of each case (e.g. volume and complexity of documents to be examined).

44. If a decision is taken not to pay, the guarantor/issuer is required to promptly so notify the beneficiary, indicating the grounds therefor (article 16(2)). If the demand is determined to be conforming, payment is to be made promptly, or at any later time stipulated in the undertaking.

45. The Convention recognizes that the guarantor/issuer may, unless the undertaking provides otherwise, discharge the payment obligation by exercising a right of set-off that is generally available under the applicable law (article 18). However, the Convention does not recognize any such right of set-off with respect to claims assigned by the principal/applicant or instructing party, as such a possibility would risk undermining the purpose of the undertaking.

D. Fraudulent or abusive demands for payment

46. A main purpose of the Convention is to establish greater uniformity internationally in the manner in which guarantors/issuers and courts respond to allegations of fraud or abuse in demands for payment under independent guarantees and stand-by letters of credit. That has been a particularly troublesome and disruptive area in practice because allegations of fraud have a tendency to arise when there is a dispute as to the performance of an underlying contractual obligation. That difficulty and the resulting uncertainty have been compounded further because of the divergent notions and ways with which such allegations have been treated both by guarantors/issuers and by courts approached for provisional measures to block payment.

47. The Convention helps to ameliorate the problem by providing an internationally agreed general definition of the types of situations in which an exception to the obli-
1. The definition encompasses fact patterns covered in different legal systems by notions such as “fraud” or “abuse of right”. The definition refers to situations in which it is manifest and clear that any document is not genuine or has been falsified, that no payment is due on the basis asserted in the demand, or that the demand has no conceivable basis.

48. For additional precision, the Convention provides illustrative examples of cases in which a demand would be deemed to have no conceivable basis (article 19(2); e.g. the underlying obligation has been undoubtedly fulfilled to the satisfaction of beneficiary; the fulfilment of the underlying obligation clearly has been prevented by wilful misconduct of beneficiary; 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).

49. The Convention, by entitling but not imposing a duty on the guarantor/issuer, as against the beneficiary, to refuse payment when confronted with fraud or abuse (article 19(1)), strikes a balance between different interests and considerations at play. By allowing discretion to the guarantor/issuer acting in good faith, the Convention is sensitive to the concern of guarantor/issuers over preserving the commercial reliability of undertakings as promises that are independent from underlying transactions.

50. At the same time, the Convention affirms that the principal/applicant, in the situations referred to, is entitled to provisional court measures to block payment (article 19(3)). This recognizes that it is the proper role of courts, and not of guarantors/issuers, to investigate the facts of underlying transactions. Furthermore, the Convention does not annul any rights that the principal/applicant may have in accordance with its contractual relationship with the guarantor/issuer to avoid reimbursement of payment made in contravention of the terms of that contractual relationship.

V. PROVISIONAL COURT MEASURES

51. Apart from entitling a principal/applicant or an instructing party to provisional court measures blocking payment or freezing proceeds of an undertaking in the types of cases referred to above, the Convention establishes a standard of proof to be met in order to obtain such provisional measures (article 20(1)). That standard refers to ordering of provisional measures on the basis of immediately available strong evidence of a high probability that the fraudulent or abusive circumstances are present. Reference is also made to consideration of whether the principal/applicant would be likely to suffer serious harm in the absence of the provisional measures and to the possibility of the court requiring security to be posted.

52. While authorizing provisional court measures in the cases concerned, the Convention minimizes the use of judicial procedures to interfere in undertakings by limiting the granting of provisional court measures to those types of cases, with one additional type of case. Provisional court orders blocking payment or freezing proceeds are also authorized in the case of use of an undertaking for a criminal purpose (article 20(3)).

VI. CONFLICT OF LAWS

53. As noted above (paragraph 23), the Convention contains in chapter VI conflict of law rules to be applied by the courts of Contracting States in order to identify the law applicable to international undertakings as defined in article 2, regardless of whether in any given case the Convention itself would prove to be the applicable law. Those conflict of laws rules recognize a choice of law stipulated in the undertaking or demonstrated by its terms or conditions, or agreed elsewhere by the guarantor/issuer and the beneficiary (article 21).

54. In the absence of a choice of law as described above, the Convention provides for application to the undertaking of the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued (article 22).

VII. FINAL CLAUSES

55. The final clauses (articles 23 to 29) contain the usual provisions relating to the Secretary-General of the United Nations as depository and providing that the Convention is subject to ratification, acceptance or approval by those States that have signed it by 11 December 1997, that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.

56. In view of its largely suppletive character, as well as of the right of parties to exclude the Convention in its entirety, no reservations are permitted. The Convention enters into force one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.
VI. CASE LAW ON UNCITRAL TEXTS

1. The secretariat of UNCITRAL continues publishing court decisions and arbitral awards that are relevant to the interpretation or application of a text resulting from the work of UNCITRAL. For a description of CLOUT (Case Law on UNCITRAL Texts), see the User's Guide (A/CN.9/SER.C/GUIDE/1), published in 1993.

2. So far, 17 sets of abstracts have been published (A/CN.9/SER.C/ABSTRACTS/1 to 17). These documents may be obtained from the UNCITRAL secretariat:
   UNCITRAL secretariat
   P.O. Box 500
   Vienna International Centre
   A-1400 Vienna
   Austria
   Telephone: (43-1) 26060-4060 or 4061
   Telex: 135612 uno a
   Telefax: (43-1) 26060-5813

3. They may also be accessed through the UNCITRAL home page on the Internet:
   (http://www.un.or.at/uncitral).

4. Copies of complete texts of court-decisions and arbitral awards, in the original language, reported on in the context of CLOUT are sent by the secretariat to the interested persons upon request, against a fee covering the cost of copying and mailing.
VII. STATUS OF UNCITRAL TEXTS

Status of Conventions: note by the Secretariat
(A/CN.9/440) [Original: English]

Not reproduced. The updated list may be obtained from the UNCITRAL secretariat or found on its home page on the Internet
(http://www.un.or.at/uncitral).
VIII. TRAINING AND ASSISTANCE

Training and technical assistance: note by the Secretariat
(A/CN.9/439) [Original: English]

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INTRODUCTION

1. Pursuant to the decision taken at the twentieth session of the Commission (1987), training and assistance activities count among the high priorities of UNCITRAL. The training and technical assistance programme carried out by the secretariat under the mandate given by the Commission, particularly in developing countries and in countries whose economic systems are in transition, encompasses two main lines of activity: (a) information activities aimed at promoting the knowledge of international commercial law conventions, model laws and other legal texts; and (b) assisting Member States in their efforts towards commercial law reform and towards the adoption of UNCITRAL texts.

2. This note sets out the activities of the secretariat subsequent to the twenty-ninth session of the Commission (28 May-14 June 1996) and discusses possible future training and technical assistance activities in the light of the trends in the demand for such services from the secretariat.

I. TRENDS IN TRAINING AND TECHNICAL ASSISTANCE

3. There is a continuing and significant increase in the importance being attributed by Governments, domestic and international business communities and multilateral and bilateral aid agencies to the improvement of the legal framework for international trade and investment.

UNCITRAL has an important function to play in this process because it has produced and promotes the use of legal instruments in a number of key areas of commercial law which represent internationally agreed standards and solutions acceptable to different legal systems. These instruments include:


(b) In the area of dispute resolution, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by it), the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules, the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Notes on Organizing Arbitral Proceedings;

(c) In the area of procurement, the UNCITRAL Model Law on Procurement of Goods, Construction and Services;

(d) In the area of banking and payments, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, the UNCITRAL Model Law on International Credit Transfers and the United Nations Convention on International Bills of Exchange and International Promissory Notes; and

4. The upsurge in commercial law reform represents a significant and crucial opportunity for UNCITRAL to significantly further the objectives of substantial coordination and acceleration of the process of harmonization and unification of international trade law, as envisaged by General Assembly resolution 2205 (XXI) of 17 December 1966.

II. TECHNICAL ASSISTANCE TO STATES IN PREPARATION AND IMPLEMENTATION OF LEGISLATION

5. Technical assistance is provided to States preparing legislation based on UNCITRAL legal texts. Such assistance is provided in various forms, including review of preparatory drafts of legislation from the viewpoint of UNCITRAL legal texts, technical consultancy services and assistance in the preparation of legislation based on UNCITRAL legal texts, preparation of regulations implementing such legislation, comments on reports of law reform commissions as well as briefings for legislators, judges, arbitrators, procurement officials and other users of UNCITRAL legal texts embodied in national legislation. Another form of technical assistance provided by the secretariat consists in advising on the establishment of institutional arrangements for international commercial arbitration, including training seminars for arbitrators, judges and practitioners in this area.

6. With a view to maximizing the benefit that recipient countries derive from UNCITRAL technical assistance, the secretariat has taken steps towards increasing cooperation and coordination with development assistance agencies. 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 prepared by the Commission and recommended by the General Assembly to be considered are in fact so considered and used. The secretariat is continuing its efforts in this regard.

7. From the standpoint of recipient States, UNCITRAL technical assistance is beneficial in view of the secretariat’s accumulated experience in the preparation of UNCITRAL legal texts. It helps establish legal systems that not only are internally consistent, but also utilizes internationally developed trade law conventions, model laws and other legal texts. The resulting legal harmonization maximizes the ability of business parties from different States to successfully plan and implement commercial transactions.

8. States that are in the process of revising or reforming their trade legislation may wish to contact the UNCITRAL secretariat in order to obtain technical assistance and advice.

III. UNCITRAL SEMINARS AND BRIEFING MISSIONS

9. The information activities of UNCITRAL are typically carried out through seminars and briefing missions for Government officials from interested ministries (such as trade, foreign affairs, justice and transport), judges, arbitrators, practising lawyers, the commercial and trading community, scholars and other interested individuals. Seminars and briefing missions are designed to explain the salient features and utility of international trade law instruments of UNCITRAL. Information is also provided on certain important legal texts of other organizations (e.g. Uniform Customs and Practice for Documentary Credits and INCOTERMS (International Chamber of Commerce); Factoring Convention (International Institute for the Unification of Private Law (UNIDROIT)). Typically, all briefing missions as well as one-day seminars are carried out by only one member of the secretariat.

10. Since the previous session, the secretariat organized seminars in a number of States. Lectures at UNCITRAL seminars are generally given by one or two members of the secretariat, experts from the host countries and, occasionally, external consultants. After the seminars, the UNCITRAL secretariat remains in contact with seminar participants in order to provide the host countries with the maximum possible support during the process leading up to the adoption and use of UNCITRAL legal texts.

11. The following seminars and briefing missions were financed with resources from the Trust Fund for UNCITRAL Symposia:

(a) Bridgetown, Barbados (23-26 April 1996), regional seminar held in cooperation with the Caribbean Community (CARICOM); attended by approximately 55 participants (in addition, the travel costs of 23 participants from CARICOM Member States was paid from the Trust Fund);

(b) Hanoi, Viet Nam (31 August 1996), briefing of 25 officials of the Ministry of Justice;

(c) Vientiane, Lao People’s Democratic Republic (3-6 September 1996), seminar and briefing mission held in cooperation with the Government of the Lao People’s Democratic Republic attended by approximately 150 participants;

(d) Bangkok, Thailand, (9-10 September 1996), briefing mission held in cooperation with the Government of Thailand, attended by approximately 25 participants;

(e) Cairo, Egypt, (2-5 December 1996), regional seminar held in cooperation with the League of Arab States, attended by approximately 100 participants;

(f) Pretoria, South Africa, (3-4 March 1997), seminar held in cooperation with the Department of Foreign Affairs’ International Legal Division, attended by approximately 30 participants.

12. The following seminars and briefing missions were financed by the institution organizing the event or by another organization:

Kuala Lumpur, Malaysia, (3-6 November 1996), arbitration seminar held in cooperation with the Malaysian Institute of Arbitrators and the Kuala Lumpur Regional Centre for Arbitration, attended by approximately 100 participants.
IV. OTHER SEMINARS, CONFERENCES, COURSES AND WORKSHOPS

13. Members of the UNCITRAL secretariat have participated as speakers in various seminars, conferences and courses, where UNCITRAL legal texts were presented for examination and discussion or for the purposes of coordination of activities. The participation of members of the secretariat in the seminars, conferences and courses listed below was financed by the institution organizing the events or by another organization:

Meeting of Law Ministers of the Commonwealth Nations sponsored by the Commonwealth Secretariat (Kuala Lumpur, Malaysia, 16-17 April 1996);

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, Italy, 22 April 1996);

Banking Law Seminar sponsored by the British Centre for English and European Legal Studies at Warsaw University, Faculty of Law and Administration (Warsaw, Poland, 6-9 May 1996);

International Credit Insurance Association (ICIA) Business School Seminar on “Independent/Demand Guarantees, Standby Letters of Credit, Performance and Contract Bonds” (Flims-Waldhaus, Switzerland, 24-27 September 1996);

Meeting of the United States Study Group on Standby Practices sponsored by the Institute of International Banking Law and Practice (New York, United States of America, 25-29 September 1996);

“Doing Business Securely on the Information Highway” Conference sponsored by the EDI World Institute (Montreal, Canada, 30 September-1 October 1996);

International Special Fellowship Course on Arbitration sponsored by the Chartered Institute of Arbitrators (Berlin, Germany, 18-20 October 1996);

“International BOT Contracts — Legal Aspects and Peaceful Means for Settling Relevant Disputes” Conference sponsored by the Cairo Regional Centre for International Commercial Arbitration (Hurghada, Egypt, 21-24 October 1996);

International Entry and Special Fellowship Courses on Arbitration sponsored by the Chartered Institute of Arbitrators (Singapore, 1-3 November and 8-9 November 1996);

Law Course No. 13 sponsored by the International Development Law Institute (Rome, Italy, 6 November 1996);

Promotion of Guarantee and Standby Convention Briefings sponsored by the United States Council on International Banking and Citibank (Tokyo, Japan, 11 November 1996; Beijing, China, 13 November 1996; Hong Kong, 15 November 1996; and Singapore, 18 November 1996);

International Special Fellowship Course on Arbitration sponsored by the Chartered Institute of Arbitrators (Edinburgh, Scotland, 22-24 November 1996);

Field Briefings sponsored by the United States Council on International Banking and Citibank (Tokyo, Japan, 11 November 1996; Beijing, China, 13 November 1996; Hong Kong, 15 November 1996; and Singapore, 18 November 1996);

Lecture on work of UNCITRAL sponsored by the Institut des Hautes Etudes Internationales (Geneva, Switzerland, 5 February 1997); and


14. The participation of members of the UNCITRAL secretariat as speakers in the conferences listed below was financed with resources from the Trust Fund for UNCITRAL Symposia and from the United Nations regular travel budget:

“Commercial Dispute Resolution in Central and Eastern Europe” Conference sponsored by the International Development Law Institute (IDLI), European Bank for Reconstruction and Development (EBRD) and the Central European Initiative (CEI) (Trieste, Italy, 28-29 June 1996);

“Legal Development in a Socialist-Oriented Market Economy” Conference sponsored by the Governments of Australia and Viet Nam, Ministry of Justice, Hanoi and ALEC (Hanoi, Viet Nam, 28-30 August 1996);

International Council for Commercial Arbitration (ICCA) Seoul Conference 1996 and Council Meeting sponsored by ICCA (Seoul, Republic of Korea, 9-13 October 1996);

Annual Conference of the Commercial Finance Association (Chicago, Illinois, United States of America, 14-16 October 1996);

26th Biennial Conference sponsored by the International Bar Association (Berlin, Germany, 20-25 October 1996);

International Council for Commercial Arbitration (ICCA) Meeting of Programme Committee (Paris, France, 20 December 1996);

Meeting of the Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment sponsored by the International Institute for the Unification of Private Law (UNIDROIT) (Rome, Italy, 15-17 and 20-21 January 1997);

Symposium on the Harmonization of Commercial Law: Coordination and Collaboration sponsored by the International Chamber of Commerce (ICC) (Rome, Italy, 18 January 1997); and

“The Resolution of Trade and Investment Disputes in Africa” Conference sponsored by the Association of Arbitrators (Southern Africa) (Johannesburg, South Africa, 5-8 March 1997).

V. INTERNSHIP PROGRAMME

15. The internship programme is designed to give young lawyers the opportunity to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law. During the past year, the secretariat has hosted 8 interns from Canada, France, Germany, Spain, the United Kingdom of
Great Britain and Northern Ireland and the United States of America. Interns are assigned tasks such as basic or advanced research, collection and systematization of information and materials or assistance in preparing background papers. The experience of UNCITRAL, with the internship programme has been positive. As 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 Government agency, or they meet their expenses from their own means. The Commission may wish, in this connection, to invite Member States, universities and other organizations, in addition to those that already do so, to consider sponsoring the participation of young lawyers in the United Nations internship programme with UNCITRAL.

16. In addition, the secretariat occasionally accommodates requests by scholars and legal practitioners who wish to conduct research in the Branch and in the UNCITRAL Law Library for a limited period of time.

VI. FUTURE ACTIVITIES

17. For the remainder of 1997, seminars and legal-assistance briefing missions are being planned in Africa, Asia, Latin America and eastern Europe. Since the costs of training and technical assistance activities is not covered by the regular budget, the ability of the secretariat to implement these plans is contingent upon the receipt of sufficient funds in the form of contributions to the Trust Fund for UNCITRAL Symposia.

18. 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 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 drawn from developing countries. This year's contribution from the UNCITRAL secretariat will focus on issues of harmonization of laws on international trade law from the perspective of UNCITRAL, including past and current work.

VII. FINANCING PROGRAMME IMPLEMENTATION

19. The secretariat continues its efforts to devise a more extensive training and technical assistance programme to meet the considerably greater demand from States for training and assistance in keeping with the call of the Commission at the twentieth session (1987) for an increased emphasis both on training and assistance and on the promotion of the legal texts prepared by the Commission. However, as no funds for the travel expenses of lecturers or participants are provided for in the regular budget, expenses for UNCITRAL training and technical assistance activities (except for those that are funded by funding agencies such as the World Bank) have to be met by voluntary contributions to the Trust Fund for UNCITRAL Symposia.

20. Given the importance of extra-budgetary funding for the implementation of the training and technical assistance component of the UNCITRAL work programme, the Commission may again wish to appeal to all States, international organizations and other interested entities to consider making contributions to the Trust Fund for UNCITRAL Symposia, particularly in the form of multi-year contributions, so as to facilitate planning and enable the secretariat to meet the increasing demands in developing countries and newly independent States for training and assistance. The secretariat can be contacted for information on how to make contributions.

21. In the period under review, a contribution from Switzerland was made 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.

22. In this connection, the Commission may wish to recall that, in accordance with General Assembly resolution 48/32 of 9 December 1993, the Secretary-General was requested to establish a separate trust fund for granting travel assistance to developing States Members of the United Nations Commission on International Trade Law. The Trust Fund so established is open to voluntary financial contributions from States, intergovernmental organizations, regional economic integration organizations, national institutions and non-governmental organizations as well as natural and juridical persons.

23. At its previous session, the Commission noted that the General Assembly had not had the opportunity, during its fiftieth session, to consider the request that had been made by the Commission at its twenty-eighth session that the UNCITRAL Trust Fund for Symposia 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. Accordingly, the Commission requested that the Sixth Committee recommend to the General Assembly the adoption of a resolution including the UNCITRAL Trust Fund for Symposia and the Trust Fund for Granting Travel Assistance to Developing States Members of UNCITRAL on the agenda of the United Nations Pledging Conference for Development Activities (A/51/17, para. 254).*

24. In its resolution 51/161 of 16 December 1996, the General Assembly decided to include the trust funds for symposia and travel assistance in the list of funds and programmes that are dealt with at the United Nations Pledging Conference for Development Activities.

Part Three

ANNEXES
I. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

PREAMBLE

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
(b) greater legal certainty for trade and investment;
(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
(d) protection and maximization of the value of the debtor's assets; and
(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Chapter I. General provisions

Article 1. Scope of application

(1) This Law applies where:

(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding;
(b) assistance is sought in a foreign State in connection with a proceeding under [identify laws of the enacting State relating to insolvency]; or
(c) a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or
(d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [identify laws of the enacting State relating to insolvency].

(2) This Law does not apply to a proceeding concerning [designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law].

Article 2. Definitions

For the purposes of this Law:

(a) "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
(b) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
(c) "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;
(d) "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
(e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
(f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. [Competent court or authority]?

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts, authority or authorities competent to perform those functions in the enacting State].

Article 5. Authorization of [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to act in a foreign State

A [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 7. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State.

A. Where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies, it might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in this State governing the authority of [insert the title of the government-appointed person or body].

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Article 8. Interpretation

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

Chapter II. Access of foreign representatives and creditors to courts in this State

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

A foreign representative is entitled to apply to commence a proceeding under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding are otherwise met.

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [identify laws of the enacting State relating to insolvency].

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State.

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g., claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other similar formality is required.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for their filing;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

Chapter III. Recognition of a foreign proceeding and relief

Article 15. Application for recognition of a foreign proceeding

(1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

(2) An application for recognition shall be accompanied by:

(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 16. Presumptions concerning recognition

(1) If the decision or certificate referred to in article 15(2) indicates that the foreign proceeding is a proceeding within the

[The enacting State may wish to consider the following alternative wording to replace article 15(2):]

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g., claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].
meaning of article 2(a) and that the foreign representative is a person or body within the meaning of article 2(d), the court is entitled to so presume.

(2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

(3) In the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests.

Article 17. Decision to recognize a foreign proceeding

(1) Subject to article 6, a foreign proceeding shall be recognized if:

(a) the foreign proceeding is a proceeding within the meaning of article 2(a);

(b) the foreign representative applying for recognition is a person or body within the meaning of article 2(d);

(c) the application meets the requirements of article 15(2), and

(d) the application has been submitted to the court referred to in article 4.

(2) The foreign proceeding shall be recognized:

(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

(3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

(4) The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

(a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative’s appointment; and

(b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) staying execution against the debtor’s assets;

(b) entrusting the administration or realization of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) any relief mentioned in article 21(1)(c), (d) and (g).

(2) [Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]

(3) Unless extended under article 21(1)(f), the relief granted under this article terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Article 20. Effects of recognition of a foreign main proceeding

(1) Upon recognition of a foreign proceeding that is a foreign main proceeding:

(a) commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed;

(b) execution against the debtor’s assets is stayed; and

(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

(2) The scope, and the modification or termination, of the stay and suspension referred to in paragraph (1) of this article are subject to [refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph (1) of this article.]

(3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

(4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under [identify laws of the enacting State relating to insolvency] or the right to file claims in such a proceeding.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

(1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities, to the extent they have not been stayed under article 20(1)(a);

(b) staying execution against the debtor’s assets to the extent it has not been stayed under article 20(1)(b);

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under article 20(1)(c);

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration or realization of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court;
(f) extending relief granted under article 19(1);

(g) granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.

(2) Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

(3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 22. Protection of creditors and other interested persons

(1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph (3) of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

(2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

(3) The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Article 23. Actions to avoid acts detrimental to creditors

(1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation].

(2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

Article 24. Intervention by a foreign representative in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

Chapter IV. Cooperation with foreign courts and foreign representatives

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

(1) In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State].

(2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives

(1) In matters referred to in article 1, a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

(2) The [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

(a) appointment of a person or body to act at the direction of the court;

(b) communication of information by any means considered appropriate by the court;

(c) coordination of the administration and supervision of the debtor’s assets and affairs;

(d) approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) coordination of concurrent proceedings regarding the same debtor;

(f) [the enacting State may wish to list additional forms or examples of cooperation].

Chapter V. Concurrent proceedings

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

Where a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] are taking
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place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) when the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,

(i) any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and

(ii) if the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;

(b) when the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

(i) any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

(ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in article 20(1) shall be modified or terminated pursuant to article 20(2) if inconsistent with the proceeding in this State;

(c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [identify laws of the enacting State relating to insolvency], proof that the debtor is insolvent.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [identify laws of the enacting State relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.
# II. GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

(A/CN.9/442) [Original: English]

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**INTRODUCTION**

When the Commission at its thirtieth session (Vienna, 12-30 May 1997) finalized the UNCITRAL Model Law on Cross-Border Insolvency, it did not have time to consider the draft Guide to Enactment of the UNCITRAL Model Provisions on Cross-Border Insolvency (A/CN.9/436), as it had been prepared by the Secretariat on the basis of the draft Model Provisions on Cross-Border Insolvency (A/CN.9/435, annex) formulated by the Working Group on Insolvency Law. Since much of the material for the future Guide to Enactment was to be found in the report of the thirtieth session of the Commission and other travaux préparatoires, the Commission requested the Secretariat to prepare a final version of the Guide to Enactment, reflecting the deliberations and decisions at the thirtieth session. The Commission mandated the publication of the final version of the Guide together with the text of the Model Law, as a single document.\(^6\)

The requested Guide to Enactment as prepared by the Secretariat is set forth in the annex to this document. The Guide and the Model Law will also be published by the United Nations in book form.

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\(^6\)Ibid., para. 220.
ANNEX

GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

I. PURPOSE AND ORIGIN OF THE MODEL LAW

1. The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

2. The Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Thus, the States enacting the Model Law (hereafter "enacting States") would be introducing useful additions and improvements in national insolvency regimes designed to resolve problems arising in cross-border insolvency cases. Not only jurisdictions that currently have to deal with numerous cases of cross-border insolvency but also those that wish to be well prepared for the increasing likelihood of cases of cross-border insolvency will find the Model Law useful.

3. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several modest, but nonetheless significant ways. These include:
   (a) providing access for the person administering a foreign insolvency proceeding ("foreign representative") to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;
   (b) determining when a foreign insolvency proceeding should be accorded "recognition", and what the consequences of recognition may be;
   (c) providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;
   (d) permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;
   (e) authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;
   (f) providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State;
   (g) establishing rules for coordination of relief granted in the enacting State in favour of two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

Preparatory work and adoption

4. The project was initiated in UNCITRAL in close cooperation with the International Association of Insolvency Practitioners (INSOL) and benefited from its expert advice during all stages of the preparatory work. Active consultative assistance during the formulation of the Law was received also from Committee J (Insolvency) of the Section on Business Law of the International Bar Association (IBA).

5. Prior to the decision by the Commission to undertake work on cross-border insolvency, UNCITRAL and INSOL held two international colloquia of insolvency practitioners, judges, government officials and representatives of other interested sectors. The suggestion arising from those meetings was that work by the Commission should have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

6. When the Commission decided in 1995 to develop a legal instrument relating to cross-border insolvency, it entrusted the work to the Working Group on Insolvency Law, one of the Commission’s three inter-governmental subsidiary bodies. The Working Group devoted four two-week sessions to the work on the project.

7. Before the session of the Commission in May 1997, at which the Model Law was adopted, another international meeting of practitioners was held to discuss the draft text as prepared by the Working Group. The participants (mostly judges, judicial administrators and government officials) generally considered that the model legislation, when enacted, would constitute a major improvement in dealing with cross-border insolvency cases.

II. PURPOSE OF THE GUIDE

9. The Commission considered that the Model Law would be a more effective tool for legislators if it were accompanied by background and explanatory information. While such information would primarily be directed to executive branches of Governments and legislators preparing the necessary legislative revisions, it would also provide useful insight to other users of the text such as judges, practitioners and academics. The Guide might also assist States in considering which, if any, of the provisions should be varied in order to be adapted to the particular national circumstances.

10. The present Guide has been prepared by the Secretariat pursuant to the request of the Commission made at the close of the thirtieth session of the Commission in 1997. It is based on the deliberations and decisions at that session of the Commission, when the Model Law was adopted, as well as on considerations of the Working Group on Insolvency Law, which conducted the preparatory work.

III. MODEL LAW AS VEHICLE FOR HARMONIZATION OF LAWS

11. A model law is a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, a model law does not require the State enacting it to notify the United Nations or other States that may have also enacted it.

12. In incorporating the text of the model law into its system, the State may modify or leave out some of its provisions. In the case of a convention, the possibility of changes to the uniform text by the States parties (normally referred to as “reservations”) is much more restricted: in particular trade law conventions usually either totally prohibit reservations or allow only specified ones. The flexibility inherent in a model law is particularly desirable in those cases when it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as a national law. Some modifications may be expected in particular when the uniform text is closely related to the national court and procedural system (which is the case with the UNCITRAL Model Law on Cross-Border Insolvency). This, however, also means that the degree of, and certainty about, harmonization achieved through a model law is likely to be lower than in the case of a convention. Therefore, in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that the States make as few changes as possible in incorporating the model law into their legal systems.

IV. MAIN FEATURES OF THE MODEL LAW

A. Background

13. The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws have by and large not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation, and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment.

14. Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, both in terms of frequency and magnitude. The modern interconnected world makes such fraud easier to conceive and carry out. The cross-border cooperation mechanisms established by the Model Law are designed to confront such international fraud.

15. Only a limited number of countries have a legislative framework for dealing with cross-border insolvency that is well suited to the needs of international trade and investment. Various techniques and notions are employed in the absence of a specific legislative or treaty framework for dealing with cross-border insolvency. These 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; enforcement of foreign insolvency orders relying on legislation for enforcement of foreign judgments; techniques such as letters rogatory for transmitting requests for judicial assistance.

16. Approaches based purely on the doctrine of comity or on the exequatur do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as the one contained in the Model Law, on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. For example, in a given legal system general legislation on reciprocal recognition of judgments, including exequatur, might be confined to enforcement of specific money judgments or injunctive orders in two-party disputes, thus excluding decisions opening collective insolvency proceedings. Furthermore, recognition of foreign insolvency proceedings might not be considered as a matter of recognizing a foreign “judgment”, for example, if the foreign bankruptcy order is considered to be merely a declaration of status of the debtor or if the order is considered not to be final.

17. To the extent that there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it is more likely that assets would be dissipated or fraudulently concealed, or possibly liquidated without reference to other more advantageous solutions. As a result, not only is the ability of creditors to receive payment diminished, but so is the possibility of rescuing financially viable businesses and saving jobs. By contrast, mechanisms in national legislation for coordinated administration of cases of cross-border insolvency make it possible to adopt solutions that are sensible and in the best interest of the creditors and the debtor: the presence of such mechanisms in the law of a State are therefore perceived as advantageous for foreign investment and trade in that State.
18. The Model Law takes into account the results of other international efforts. Those include the European Union Convention on Insolvency Proceedings, the European Convention on Certain International Aspects of Bankruptcy ("Istanbul Convention", 1990), the Montevideo Private International Law Treaties of 1889 and 1940, the Convention regarding Bankruptcy between Nordic States (1953) as well as the Havana Convention of 1928 (" Bustamante Code"). Proposals from non-governmental organizations that have been taken into account include the Model International Insolvency Cooperation Act (MICCA) as well as the Cross-Border Insolvency Concordat, both developed by Committee J of the Section on Business Law of the International Bar Association (IBA).

19. When the European Union Convention on Insolvency Proceedings enters into effect, it will establish an intra-Union cross-border insolvency regime for cases where the debtor has the centre of its main interests in a State member of the Union. The Convention does not deal with cross-border insolvency matters extending beyond a State member of the Union into a non-member State. Thus, the Model Law offers to States members of the Union a complementary regime of considerable practical value that addresses the many cases of cross-border cooperation not covered by the Convention.

B. Model Law fitting into existing national law

20. With its scope limited to some procedural aspects of cross-border insolvency cases, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State. This is manifested in several ways:

(a) The amount of possibly new legal terminology added to existing law by the Model Law is limited. New legal terms are those specific to the cross-border context, such as "foreign proceeding" and "foreign representative". The terms used in the Model Law are unlikely to be in conflict with terminology in existing law. Moreover, where the expression is likely to vary from country to country, the Model Law, instead of using a particular term, indicates the meaning of the term in italics within square brackets and calls upon the drafters of the national law to use the appropriate term;

(b) The Model Law presents to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law;

(c) Recognition of foreign proceedings does not prevent local creditors from initiating or maintaining collective insolvency proceedings in the enacting State (article 28);

(d) Relief available to the foreign representative is subject to the protection of local creditors and other interested persons, including the debtor, against undue prejudice: relief is also subject to compliance with the procedural requirements of the enacting State and to applicable notification requirements (in particular articles 22 and 19(2));

(e) The Model Law preserves the possibility of excluding or limiting any action in favour of the foreign proceeding, including recognition of the proceeding, on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used (article 6);

(f) The Model Law is in the flexible form of model legislation that takes into account differing approaches in national insolvency laws and the varying propensities of States to cooperate and coordinate in insolvency matters (articles 25-27).

21. The flexibility to adapt the Model Law to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation and for the benefits to the enacting State in adopting modern, generally acceptable international practices in insolvency matters. Thus it is advisable to limit deviations from the uniform text to the minimum. One advantage of uniformity is that it will make it easier for the enacting States to obtain cooperation from other States in insolvency matters.

C. Scope of application of Model Law

22. The Model Law applies in a number of cross-border insolvency situations. These include: (a) the case of an inward-bound request for recognition of a foreign proceeding; (b) an outward-bound request from a court or administrator in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) coordination of concurrent proceedings in two or more States; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State (article 1).

D. Types of foreign proceedings covered

23. To fall within the scope of the Model Law, a foreign insolvency proceeding needs to possess certain attributes. These include: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body, and reorganization or liquidation of the debtor as the purpose of the proceeding (article 2(a)).

24. Within those parameters, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding-up or reorganization or those in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments; "debtor in possession").

25. An inclusive approach is used also as regards the possible types of debtors covered by the Model Law. Nevertheless, the Model Law refers to the possibility of excluding from its scope of application certain types of entities, such as banks or insurance companies, specially regulated with regard to insolvency under the laws of the enacting State (article 1(2)).

E. Foreign assistance for an insolvency proceeding taking place in the enacting State

26. In addition to equipping the courts of the enacting State to deal with incoming requests for recognition, the Model Law authorizes the courts of the enacting State to seek assistance abroad on behalf of a proceeding taking place in the enacting State (article 25). Addition of the authorization for the courts of the enacting State to seek cooperation abroad may help to fill a gap in legislation in some States. Without such legislative authorization, the courts, in some legal systems, feel constrained from seeking such assistance abroad, which creates potential obstacles to a coordinated international response in case of cross-border insolvency.

27. The Model Law may similarly help an enacting State to fill a gap in its legislation as to the "outward" powers of persons appointed to administer insolvency proceedings under the local insolvency law. Article 5 authorizes those persons to seek recognition of, and assistance for, those proceedings from foreign courts.
F. Foreign representative’s access to courts of the enacting State

28. An important objective of the Model Law is to provide expedited and direct access for foreign representatives to the courts of the enacting State. The Law avoids the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications, which might otherwise have to be used. This facilitates a coordinated, cooperative approach to cross-border insolvency and enables fast action when needed.

29. In addition to establishing the principle of direct court access for the foreign representative, the Model Law:

(a) Establishes simplified proof requirements for seeking recognition and relief for foreign proceedings, which avoid time-consuming “legalization” requirements involving notarial or consular procedures (article 13);

(b) Provides that the foreign representative has procedural standing for commencing an insolvency proceeding in the enacting State (under the conditions applicable in the enacting State) and that the foreign representative may participate in an insolvency proceeding in the enacting State (articles 11 and 12);

(c) Confirms, subject to other requirements of the enacting State, access of foreign creditors to the courts of the enacting State for the purpose of commencing in the enacting State an insolvency proceeding or participating in such a proceeding (article 15);

(d) Gives the foreign representative the right to intervene in proceedings concerning individual actions in the enacting State affecting the debtor or its assets (article 24);

(e) Provides that the mere fact of a petition for recognition in the enacting State does not mean that the courts in that State have jurisdiction over all the assets and affairs of the debtor (article 10).

G. Recognition of foreign proceedings

(a) Decision whether to recognize a foreign proceeding

30. The Model Law establishes criteria for determining whether a foreign proceeding is to be recognized (articles 15-17) and provides that, in appropriate cases, the court may grant interim relief pending a decision on recognition (article 19). The decision includes a determination whether the jurisdictional basis on which the foreign proceeding was commenced was such that it should be recognized as a “main” or instead as a “non-main” foreign insolvency proceeding. Procedural matters related to notice of the filing of an application for recognition or of the decision to grant recognition are not addressed by the Model Law; they remain to be governed by other provisions of law of the enacting State.

31. A foreign proceeding is deemed to be the “main” proceeding if it has been commenced in the State where “the debtor has the centre of its main interests”. This corresponds to the formulation in the European Union Convention on Insolvency Proceedings (article 3 of that Convention), thus building on the emerging harmonization as regards the notion of a “main” proceeding. The determination that a foreign proceeding is a “main” proceeding may affect the nature of the relief accorded to the foreign representative.

(b) Effects of recognition and discretionary relief available to a foreign representative

32. Key elements of the relief accorded upon recognition of the representative of a foreign “main” proceeding include a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the assets of the debtor, and a suspension of the debtor’s right to transfer or encumber its assets (article 20(1)). Such stay and suspension are “mandatory” (or “automatic”) in the sense that either they flow automatically from the recognition of a foreign main proceeding or, in the States where a court order is needed for the stay or suspension, the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide a “breathing space” until appropriate measures are taken for reorganization or fair liquidation of the assets of the debtor. The suspension of transfers is necessary because in the modern, globalized economic system it is possible for multi-national debtors to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding provides a rapid “freeze” essential to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.

33. Exceptions and limitations to the scope of the stay and suspension (e.g. exceptions for secured claims, payments by the debtor made in the ordinary course of business, set-off, execution of rights in rem) and the possibility of modifying or terminating the stay or suspension are determined by provisions governing comparable stays and suspensions in insolvency proceedings under the laws of the enacting State (article 20(2)).

34. In addition to such mandatory stay and suspension, the Model Law authorizes the court to grant “discretionary” relief for the benefit of any foreign proceeding, whether “main” or not (article 21). Such discretionary relief may consist of, for example, staying proceedings or suspending the right to encumber assets (to the extent such stay and suspension have not taken effect automatically under article 20), facilitating access to information concerning the assets of the debtor and its liabilities, appointing a person to administer all or part of those assets, and any other relief that may be available under the laws of the enacting State. Urgently needed relief may be granted already upon filing an application for recognition (article 21).

(c) Protection of creditors and other interested persons

35. The Model Law contains provisions, such as the following, which protect the interests of the creditors (in particular local creditors), the debtor and other affected persons: the availability of temporary relief upon application for recognition of a foreign proceeding or upon recognition is subject to the discretion of the court; it is expressly stated that in granting such relief the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected (article 22(1)); the court may subject the relief it grants to conditions it considers appropriate; and the court may modify or terminate the relief granted, if so requested by a person affected thereby (article 22(2) and (3)).

36. In addition to those specific provisions, the Model Law in a general way provides that the court may refuse to take an action governed by the Law if the action would be manifestly contrary to the public policy of the enacting State (article 6).

37. Questions of notice to interested persons, while closely related to the protection of their interests, are in general not regulated in the Model Law. Thus, these questions are governed by the procedural rules of the enacting State, some of
which may be of a public-order character. For example, the law of the enacting State will determine whether any notice is to be given to the debtor or another person of an application for recognition of a foreign proceeding and the time period for giving the notice.

H. Cross-border cooperation

38. A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvency is derived from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, for pursuing cooperation with foreign courts.

39. Experience has shown that, irrespective of the discretion courts may traditionally enjoy in a State, the passage of a specific legislative framework is useful for promoting international cooperation in cross-border cases. Accordingly, the Model Law fills the gap found in many national laws by expressly empowering courts to extend cooperation in the areas governed by the Model Law (articles 25-27).

40. For similar reasons, provisions are included authorizing cooperation between a court in the enacting State and a foreign representative, and between a person administering the insolvency proceeding in the enacting State and a foreign court or a foreign representative (article 26).

41. The Model Law lists possible forms of cooperation and leaves the legislator an opportunity to list additional forms (article 27). It is advisable to keep the list, when enacted, illustrative rather than exhaustive so as not to stymie the ability of courts to fashion remedies in keeping with specific circumstances.

I. Coordination of concurrent proceedings

(a) Jurisdiction to commence a local proceeding

42. The Model Law imposes virtually no limitations on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings. Pursuant to article 28, even after recognition of a foreign “main” proceeding, jurisdiction remains with the courts of the enacting State to institute an insolvency proceeding if the debtor has assets in the enacting State. If the enacting State would wish to restrict its jurisdiction to cases where the debtor has not only assets but an establishment in the enacting State, the adoption of such a restriction would not be contrary to the policy underlying the Model Law.

43. In addition, the Model Law deems the recognized foreign main proceeding to constitute proof that the debtor is insolvent for the purposes of commencing local proceedings (article 31). This rule would be helpful in those legal systems in which commencement of an insolvency proceeding requires proof that the debtor is in fact insolvent. Avoidance of the need for repeated proof of financial failure reduces the likelihood that a debtor may delay the commencement of the proceedings long enough to conceal or carry away assets.

(b) Coordination of relief when more than one proceeding take place concurrently

44. The Model Law deals with coordination between a local proceeding and a foreign proceeding concerning the same debtor (article 29) and facilitates coordination between two or more foreign proceedings concerning the same debtor (article 30). The objective of the provisions is to foster coordinated decisions that would best achieve the objectives of both proceedings (e.g. maximization of the value of the debtor’s assets or the most advantageous restructuring of the enterprise). In order to achieve satisfactory coordination and to be able to adapt relief to changing circumstances, the court is in all situations covered by the Model Law, including those which limit the effects of foreign proceedings in the face of local proceedings, directed to cooperate to the maximum extent possible with foreign courts and the foreign representatives (articles 25 and 30).

45. When the local insolvency proceeding is already under way at the time that recognition of a foreign proceeding is requested, the Model Law requires that any relief granted for the benefit of the foreign proceeding must be consistent with the local proceeding. Furthermore, the existence of the local proceeding at the time the foreign main proceeding is recognized prevents the operation of article 20. When there is no local proceeding pending, article 20 mandates the stay of individual actions or enforcement proceedings against the debtor and a suspension of the debtor’s right to transfer or encumber its assets.

46. When the local proceeding begins subsequent to recognition or application for recognition of the foreign proceeding, the relief that has been granted for the benefit of the foreign proceeding must be reviewed and modified or terminated if inconsistent with the local proceeding. If the foreign proceeding is a main proceeding, the stay and a suspension, as mandated by article 20, must also be modified or terminated if inconsistent with the local proceeding.

47. When the court is faced with more than one foreign proceeding, article 30 calls for tailoring relief in such a way that will facilitate coordination of the foreign proceedings; if one of the foreign proceedings is a main proceeding, any relief must be consistent with that main proceeding.

48. Another rule designed to enhance coordination of concurrent proceedings is the one on rate of payment of creditors (article 32). It provides that a creditor, by claiming in more than one proceeding, does not receive more than the proportion of payment that is obtained by other creditors of the same class.

V. ARTICLE-BY-ARTICLE REMARKS

Title: “UNCITRAL Model Law on Cross-Border Insolvency”

“Insolvency”

49. The term “insolvency”, as used in the title of the Model Law, refers to various types of collective proceedings against insolvent debtors. The reason is that the Model Law (as pointed out above in paragraphs 23-24) covers proceedings concerning different types of debtors, and, among those proceedings, deals with proceedings aimed at reorganizing the debtor as well as proceedings leading to a liquidation of the debtor as a commercial entity.

50. It should be noted that in some jurisdictions the expression “insolvency” proceedings has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person, or only to collective proceedings against a natural person. No such distinction is intended to be drawn by the use of the term “insolvency” in the title of the Model Law, since the Law is designed to be applicable to proceedings regardless of whether they involve a natural
or legal person as the debtor. If in the enacting State the word “insolvency” may be misunderstood as referring to one particular type of collective proceeding, another term should be used to refer to the proceedings covered by the Law.

51. However, when referring to foreign insolvency proceedings, it is desirable to utilize the wording of article 2(a) so as not to exclude recognition of foreign proceedings that, according to article 2(a), should be covered.

“Model Law”

52. If the enacting State decides to incorporate the provisions of the Model Law into an existing national insolvency statute, the title of the enacted provisions would have to be adjusted accordingly, and the word “Law”, which appears at various places in the text, would have to be replaced by the appropriate expression.

53. In enacting the Model Law, it is advisable to adhere as much as possible to the uniform text so as to make the national law as transparent as possible for foreign users of the national law. (See also paragraphs 11-12 and 21, above)

Preamble

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) greater legal certainty for trade and investment;

(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) protection and maximization of the value of the debtor’s assets; and

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

54. The Preamble gives a succinct statement of the basic policy objectives of the Model Law. It is not intended to create substantive rights, but rather to give a general orientation for users of the Model Law as well as to assist in the interpretation of the Model Law.

55. In States where it is not customary to set out preambular statements of policy in legislation, consideration might be given to including the statement of objectives either in the body of the statute or in a separate document, so as to preserve a useful tool for the interpretation of the law.

“State”

56. The expression “State”, as used in the preamble and throughout the Model Law, refers to the entity that enacts the Law (the “enacting State” in the Guide). The term should not be understood as referring, for example, to a state in a country with a federal system.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 136-139 (Commission, thirtieth session)
A/CN.9/435, paras. 100 (Working Group, twenty-first session)
A/CN.9/433, paras. 22-28 (Working Group, twentieth session)
A/CN.9/422, paras. 19-23 (Working Group, nineteenth session)

Chapter 1. General provisions

Article 1. Scope of application

(1) This Law applies where:

(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) assistance is sought in a foreign State in connection with a proceeding under [identify laws of the enacting State relating to insolvency]; or

(c) a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [identify laws of the enacting State relating to insolvency].

(2) This Law does not apply to a proceeding concerning [designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law].

Paragraph (1)

57. Article 1(1) outlines the types of issues that may arise in cases of cross-border insolvency and for which the Model Law provides solutions: (a) inward-bound requests for recognition of a foreign proceeding; (b) outward-bound requests from a court or administrator in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) coordination of proceedings taking place concurrently in two or more States; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State.

58. The expression “this State” is used in the preamble and throughout the Model Law to refer to the State that is enacting the text. The national statute may use another expression that is customarily used for this purpose.

59. “Assistance” in paragraph (1)(a) and (b) is meant to cover various situations, dealt with in the Model Law, in which a court or an insolvency administrator in one State may make a request directed to a court or an insolvency administrator in another State for taking a measure encompassed in the Model Law. Some of those measures the Law specifies (e.g. in article 19(1)(a) and (b); article 21(1)(a) to (f) and (2); or article 27(a) to (g)), while other possible measures are covered by a broader formulation such as the one in article 21(1)(g).

Paragraph (2) (Specially regulated insolvency proceedings)

60. In principle, the Model Law was formulated to apply to any proceeding that meets the requirements of article 2(a), independently of the nature of the debtor or its particular status under national law. The only possible exceptions contemplated in the text of the Model Law itself are indicated in paragraph (2) (see, however, paragraph 66, below, for considerations regarding “consumers”).
61. Banks or insurance companies are mentioned as examples of entities that the enacting State might decide to exclude from the scope of the Model Law. The reason for the exclusion would typically be that the insolvency of such entities gives rise to the particular need to protect vital interests of a large number of individuals, or that the insolvency of those entities usually requires particularly prompt and circumspect action (for instance to avoid massive withdrawals of deposits). For those reasons, the insolvency of such types of entities is in many States administered under a special regulatory regime.

62. Paragraph (2) indicates that the enacting State might decide to exclude the insolvency of entities other than banks and insurance companies; the State might do so where the policy considerations underlying the special insolvency regime for those other types of entities (e.g. public utility companies) call for special solutions in cross-border insolvency cases.

63. It is not advisable to exclude all cases of insolvency of the entities mentioned in paragraph (2). In particular, the enacting State might wish to treat, for recognition purposes, a foreign insolvency proceeding relating to a bank or an insurance company as an ordinary insolvency proceeding, if the insolvency of the branch or of the assets of the foreign entity in the enacting State do not fall under the national regulatory scheme. The enacting State might also wish not to exclude the possibility of recognition of a foreign proceeding involving one of those entities, if the law of the State of origin does not make that proceeding subject to special regulation.

64. In enacting paragraph (2), the State may wish to make sure that it would not inadvertently and undesirably limit the right of the insolvency administrator or court to seek assistance or recognition abroad of an insolvency proceeding conducted in the territory of the enacting State, merely because that insolvency is subject to a special regulatory regime. Moreover, even if the particular insolvency is governed by special regulation, it is advisable, before generally excluding those cases from the Model Law, to consider whether it would be useful to leave certain features of the Model Law (e.g. on cooperation and coordination and possibly on certain types of discretionary relief) applicable also to the specially regulated insolvency proceedings.

65. In any case, with a view to making the national insolvency law more transparent (for the benefit of foreign users of the law based on the Model Law), it is advisable that exclusions from the scope of the law be expressly mentioned by the enacting State in paragraph (2).

Non-traders or natural persons

66. In those jurisdictions that have not made provision for the insolvency of consumers, or whose insolvency law provides special treatment for the insolvency of non-traders, the enacting State might wish to exclude from the scope of application of the Model Law those insolvencies that relate to natural persons residing in the enacting State whose debts have been incurred predominantly for personal or household purposes, rather than for commercial or business purposes, or those insolvencies that relate to non-traders. The enacting State might also wish to provide that such exclusion would not apply in cases where the total debts exceed a certain monetary ceiling.

Prior discussion in the Commission and the Working Group

A/52/17, paragraphs 141-150 (Commission, thirtieth session)
A/CN.9/435, paragraphs 102-106, 179 (Working Group, twenty-first session)

A/52117, paras. 29-32 (Working Group, twentieth session)
A/CN.9/422, paras. 24-33 (Working Group, nineteenth session)

Article 2. Definitions

For the purposes of this Law:

(a) “foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) “foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) “foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) “foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

(e) “foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) “establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Subparagraphs (a) to (d)

67. Since the Model Law will be embedded in the national insolvency law, article 2 only needs to define the terms specific to cross-border scenarios. Thus, the Model Law contains definitions of the terms “foreign proceeding” (subparagraph (a)) and “foreign representative” (subparagraph (d)), but not of the person or body that may be entrusted with the administration of the assets of the debtor in an insolvency proceeding in the enacting State. To the extent that it would be useful to define in the national statute the term used for such a person or body (rather than just using the term commonly employed to refer to such persons), this may be added to the definitions in the law enacting the Model Law.

68. By specifying required characteristics of the “foreign proceeding” and “foreign representative”, the definitions limit the scope of application of the Model Law. For a proceeding to be susceptible to recognition or cooperation under the Model Law and for a foreign representative to be accorded access to local courts under the Model Law, the foreign proceeding and the foreign representative must have the attributes of subparagraphs (a) and (d).

69. The definitions in subparagraphs (a) and (d) cover also an “interim proceeding” and a representative “appointed on an interim basis”. In a State where interim proceedings are either not known or do not meet the requisites of the definition the question may arise whether recognition of a foreign “interim proceeding” creates a risk of allowing potentially disruptive consequences under the Model Law that the situation does not warrant. It is advisable that, irrespective of the way interim proceedings are treated in the enacting State, the reference to “interim proceeding” in subparagraph (a) and to a foreign representative appointed “on an interim basis” in subparagraph (d) be maintained.
reason is that in the practice of many countries insolvency pro-
ceedings are often, or even usually, conducted on an "interim" or "provisional" basis. Except for being labelled as interim, those
proceedings meet all the other requisites of the definition in
article 2(a). Such proceedings are often conducted for weeks or
months as "interim" proceedings under the administration of
persons appointed on an "interim" basis, and only some time later
would the court issue an order continuing the continuation of the
proceedings on a non-interim basis. The objectives of the Model
Law apply fully to such "interim proceedings" (provided the
requirements of subparagraphs (a) and (d) are met); therefore, these
proceedings should not be distinguished from other insolvency
proceedings merely because they are of an interim nature. The
point that an interim proceeding and the foreign representative
must meet all the requirements of article 2 is emphasized in
article 17(1), according to which a foreign proceeding may only
be recognized if "the foreign proceeding is a proceeding within
the meaning of article 2(a)" and "the foreign representative
applying for recognition is a person or body within the meaning
of article 2(d)".

70. Article 18 addresses a case where, after the application for
recognition or after recognition, the foreign proceeding or for-
71. The definitions of proceedings or persons emanating from
foreign jurisdictions avoid the use of expressions that may have
different technical meaning in legal systems and instead describe
their purpose or function. This technique is used to avoid inad-
vertently narrowing the range of possible foreign proceedings
that might obtain recognition, and to avoid unnecessary conflict
with terminology used in the laws of the enacting State. As noted
above in paragraph 50, the term "insolvency" is an example of
a term that may have a technical meaning in some legal systems,
but which is intended in subparagraph (a) to refer broadly to
companies in severe financial distress.

72. The expression "centre of main interests" in subparagraph
(b) to define a foreign main proceeding is used also in the

Subparagraph (c) requires that a "foreign non-main pro-
ceeding" take place in the State where the debtor has an "es-
73. Subparagraph (c) requires that a "foreign non-main pro-
ceeding" take place in the State where the debtor has an "es-
74. A foreign proceeding that meets the requisites of article
2(a) should receive the same treatment irrespective of whether
it has been commenced and supervised by a judicial or admin-
istrative body. Therefore, in order to obviate the need to refer
to a foreign non-judicial authority whenever reference is made
to a foreign court, the definition of "foreign court" in
subparagraph (e) includes also non-judicial authorities.
Subparagraph (c) follows a similar definition contained in article
2(d) of the European Union Convention on Insolvency Proceedings.

Subparagraph (f)
75. The definition of the term "establishment" (subparagraph
(f)) has been inspired by article 2(h) of the European Union
Convention on Insolvency Proceedings. The term is used in the
definition of "foreign non-main proceeding" (article 2(c)) and in
the context of article 17(2), according to which, for a foreign
non-main proceeding to be recognized, the debtor must have
an establishment in the foreign State (see also paragraph 73,
above).

Prior discussion in the Commission and
the Working Group
A/52/17, paras. 152-158 (Commission, thirtieth session)
A/CN.9/435, paras. 108-113 (Working Group, twenty-first
session)
A/CN.9/433, paras. 33-41, 147 (Working Group, twentieth
session)
A/CN.9/422, paras. 34-65 (Working Group, nineteenth
session)
A/CN.9/419, paras. 95-117 (Working Group, eighteenth
session)

Article 3. International obligations of this State
To the extent that this Law conflicts with an obligation of
this State arising out of any treaty or other form of agree-
ment to which it is a party with one or more other States, the
requirements of the treaty or agreement prevail.

76. Article 3, expressing the principle of supremacy of inter-
national obligations of the enacting State over internal law, has
been modelled on similar provisions in other model laws pre-
pared by UNCITRAL.

77. In enacting the article, the legislator may wish to consider
whether it would be desirable to take steps to avoid an unneces-
sarily broad interpretation of international treaties. Namely,
the article might result in giving precedence to international
treaties which, while addressing matters covered also by the
Model Law (e.g. access to courts and cooperation between courts
or administrative authorities), were aimed at the resolution of
problems other than those that the Model Law focuses on.
Some of those treaties, only because of their imprecise or broad
formulation, may be misunderstood as dealing also with matters
dealt with by the Model Law. Such a result would com-
promise the goal of achieving uniformity and facilitating cross-
border cooperation in insolvency matters and would reduce
certainty and predictability in the application of the Model
Law. The enacting State might wish to provide that, in order for
article 3 to displace a provision of the national law, a suffi-
cient link must exist between the international treaty concerned
and the issue governed by the provision of the national law
in question. Such a condition would avoid the inadvertent and
excessive restriction of the effects of the law which implements
the Model Law. However, such a provision should not go so
far as imposing a condition that the treaty concerned has to
deal specifically with insolvency matters in order to satisfy that
condition.
78. It is noteworthy that, while in some States binding international treaties are self-executing, in other States those treaties are, with certain exceptions, not self-executing in that they require internal legislation for them to become enforceable law. With respect to the latter group of States, in view of their normal practice in dealing with international treaties and agreements, it would be inappropriate or unnecessary to include article 3 in their legislation or it might be appropriate to include it in modified form.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 160-162 (Commission, thirtieth session)
A/CN.9/435, paras. 114-117 (Working Group, twenty-first session)
A/CN.9/433, paras. 42-43 (Working Group, twentieth session)
A/CN.9/422, paras. 66-67 (Working Group, nineteenth session)

Article 4. [Competent court or authority]*

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [specify the court, courts, authority or authorities competent to perform those functions in the enacting State].

* A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies may wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in this State governing the authority of [insert the title of the government-appointed person or body].

79. If in the enacting State any of the functions mentioned in article 4 are performed by an authority other than a court, the State would insert in article 4 and in other appropriate places in the enacting legislation the name of the competent authority.

80. The competence for the various judicial functions dealt with in the Model Law may lie with different courts in the enacting State, and the enacting State would tailor the text of the article to its own system of court competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the insolvency legislation for the benefit of, in particular, foreign representatives and foreign courts.

81. It is important to note that, in defining jurisdiction in matters mentioned in article 4, the implementing legislation should not unnecessarily limit the jurisdiction of other courts in the enacting State, in particular to entertain requests by foreign representatives for provisional relief.

Footnote
82. In a number of States, insolvency legislation has entrusted certain tasks relating to the general supervision of the process of dealing with insolvency cases in the country to government-appointed officials who are typically civil servants or judicial officers and who carry out their functions on a permanent basis. The names under which they are known vary and include, for example, "official receiver", "official trustee" or "official assignee". The activities, and the scope and nature of their duties, vary from State to State. The Model Law does not restrict the authority of such officials, a point that some enacting States may wish to clarify in the law, as indicated in the footnote. However, depending on the wording that the enacting State uses in articles 25 and 26 in referring to the "title of the person or body administering a reorganization or liquidation under the law of the enacting State", these officials may be subjected to the duty to cooperate as provided under articles 25 to 27.

83. In some jurisdictions, officials referred to in the preceding paragraph may also be appointed to act as administrators in individual insolvency cases. To the extent that that occurs, such officials would be covered by the Model Law.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 163-166 (Commission, thirtieth session)
A/CN.9/435, paras. 118-122 (Working Group, twenty-first session)
A/CN.9/433, paras. 44-45 (Working Group, twentieth session)
A/CN.9/422, paras. 68-69 (Working Group, nineteenth session)
A/CN.9/419, para. 69 (Working Group, eighteenth session)

Article 5. Authorization of [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to act in a foreign State

A [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

84. The intent of article 5 is to equip administrators or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings. The lack of such authority in some States has proved to be an obstacle to effective international cooperation in cross-border cases. An enacting State in which administrators are already equipped to act as foreign representatives may decide to forgo inclusion of article 5, although even such a State might want to keep article 5 so as to provide clear statutory evidence of that authority.

85. It may be noted that article 5 is formulated to make it clear that the scope of the power exercised abroad by the administrator would depend upon the foreign law and courts. Actions that the administrator appointed in the enacting State may wish to take in a foreign country will be actions of the type that are dealt with in the Model Law, but the authority to act in a foreign country does not depend on whether that country has enacted legislation based on the Model Law.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 167-169 (Commission, thirtieth session)
A/CN.9/435, paras. 123-124 (Working Group, twenty-first session)
A/CN.9/433, paras. 46-49 (Working Group, twentieth session)
A/CN.9/422, paras. 70-74 (Working Group, nineteenth session)
A/CN.9/419, paras. 36-39 (Working Group, eighteenth session)
Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

86. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 6.

87. In some States the expression “public policy” may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. However, in many States the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in these States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when that would contravene those fundamental principles.

88. For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, and the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if public policy would be understood in an extensive manner.

89. The purpose of the expression “manifestly”, used also in many other international legal texts as a qualifier of the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 170-173 (Commission, thirtieth session)
A/CN.9/435, paras. 125-128 (Working Group, twenty-first session)
A/CN.9/433, paras. 156-160 (Working Group, twentieth session)
A/CN.9/422, paras. 84-85 (Working Group, nineteenth session)
A/CN.9/419, para. 40 (Working Group, eighteenth session)

Article 7. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State.

90. The purpose of the Model Law is to increase and harmonize cross-border assistance available in the enacting State to foreign representatives. However, since the law of the enacting State may, at the time of enacting the Law, already have in place various provisions under which a foreign representative could obtain cross-border assistance, and since it is not the purpose of the Law to displace those provisions to the extent they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law, the enacting State may consider whether article 7 is needed to make that point clear.

Prior discussion in the Commission

A/52/17, para. 175 (Commission, thirtieth session)

Article 8. Interpretation

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

91. A provision similar to the one contained in article 8 appears in a number of private-law treaties (e.g. article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980). More recently, it has been recognized that also in a non-treaty text such as a model law such a provision would be useful in that a State enacting a model law also has an interest in its harmonized interpretation. Article 8 has been modelled on article 3(1) of the UNCITRAL Model Law on Electronic Commerce (1996).

92. Harmonized interpretation of the Model Law will be facilitated by the information system CLOUT (“Case Law on UNCITRAL Texts”), a system under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and model laws emanating from the work of the Commission. (For further information about the system, see paragraph 202, below.)

Prior discussion in the Commission

A/52/17, para. 174 (Commission, thirtieth session)

Chapter II. Access of foreign representatives and creditors to courts in this State

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

93. The article is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular actions. Article 4 deals with court competence in the enacting State for providing relief to the foreign representative.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 176-178 (Commission, thirtieth session)
A/CN.9/435, paras. 129-133 (Working Group, twenty-first session)
A/CN.9/433, paras. 50-58 (Working Group, twentieth session)
A/CN.9/422, paras. 144-151 (Working Group, nineteenth session)
A/CN.9/419, paras. 77-79; 172-173 (Working Group, eighteenth session)

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.
94. The provision constitutes a "safe conduct" rule aimed at ensuring that the court in the enacting State would not assume jurisdiction over all the assets of the debtor on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding. The article also makes it clear that the application alone is not sufficient ground for the court of the enacting State to assert jurisdiction over the foreign representative as to matters unrelated to insolvency. The provision responds to concerns of foreign representatives and creditors about exposure to all-embracing jurisdiction triggered by an application under the (Model) Law.

95. The limitation on jurisdiction over the foreign representative embodied in article 10 is not absolute. It is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. It does so by providing that an appearance in the courts of the enacting State for the purpose of requesting recognition would not expose the entire estate under the supervision of the foreign representative to the jurisdiction of those courts. Other possible grounds for jurisdiction under the laws of the enacting State over the foreign representative or the assets are not affected. For example, a tort or a misconduct committed by the foreign representative may provide grounds for jurisdiction to deal with the consequences of such an action by the foreign representative. Furthermore, the foreign representative who applies for relief in the enacting State will be subject to conditions which the court may order in connection with relief granted (article 22(2)).

96. The article may appear superfluous in States where the rules on jurisdiction do not allow a court to assume jurisdiction over a person making an application to the court on the sole ground of the applicant's appearance. Nevertheless, also in those States it would be useful to enact the article so as to eliminate possible concerns of foreign representatives or creditors over the possibility of jurisdiction based on the sole ground of applying to the court.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 179-182 (Commission, thirtieth session)
A/CN.9/433, paras. 68-70 (Working Group, twentieth session)
A/CN.9/422, paras. 160-166 (Working Group, nineteenth session)

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

A foreign representative is entitled to apply to commence a proceeding under [identify laws of the enacting State relating to insolvency] if the conditions for commencing such a proceeding are otherwise met.

97. Many national laws, in enumerating persons who may request the commencement of an insolvency proceeding, do not mention a representative of a foreign insolvency proceeding under those laws, it might be doubtful whether a foreign representative is among those that may make such a request.

98. Article 11 is designed to ensure that the foreign representative (of a foreign main or non-main proceeding) has standing (or "procedural legitimation") for requesting the commencement of an insolvency proceeding. However, the article makes it clear (by the words "if the conditions for commencing such a proceeding are otherwise met") that it does not otherwise modify the conditions under which an insolvency proceeding may be commenced in the enacting State.

99. The foreign representative has this right without prior recognition of the foreign proceeding, because the commencement of an insolvency proceeding might be crucial in cases of urgent need for preserving the assets of the debtor. The article recognizes that not only a representative of a foreign main proceeding but also a representative of a foreign non-main proceeding may have a legitimate interest in the commencement of an insolvency proceeding in the enacting State. Sufficient guarantees against abusive applications are provided by the requirement that the other conditions for commencing such a proceeding under the law of the enacting State have to be met.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 183-187 (Commission, thirtieth session)
A/CN.9/435, paras. 137-146 (Working Group, twenty-first session)
A/CN.9/433, paras. 71-75 (Working Group, twentieth session)
A/CN.9/422, paras. 170-177 (Working Group, nineteenth session)

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [identify laws of the enacting State relating to insolvency].

100. The purpose of the provision is to ensure that, when an insolvency proceeding concerning a debtor is taking place in the enacting State, the foreign representative of a proceeding concerning that debtor will be given procedural standing (or "procedural legitimation") to make petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding.

101. Notably, the article is limited to giving the foreign representative standing and does not vest the foreign representative with any specific powers or rights. The provision does not specify the kinds of motions the foreign representative might make and does not affect the provisions in the insolvency law of the enacting State that govern the fate of the motions.

102. If the law of the enacting State uses a term other than "participate" to express the concept, such other term may be used in enacting the provision. However, if the legislator proposes that the other term should be "intervene", it should be noted that article 24 already uses the term "intervene" to refer to a case where the foreign representative takes part in an individual action by or against the debtor (as opposed to a collective insolvency proceeding).

Prior discussion in the Commission and the Working Group
A/52/17, paras. 188-189 (Commission, thirtieth session)
A/CN.9/435, paras. 147-150 (Working Group, twenty-first session)
A/CN.9/433, para. 58 (Working Group, twentieth session)
A/CN.9/422, paras. 114-115, 147, 149 (Working Group, nineteenth session)
Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [identify laws of the enacting State relating to insolvency] as creditors in this State.

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency], except that the claims of foreign creditors shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g., claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

The enacting State may wish to consider the following alternative wording to replace article 13(2):

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under [identify laws of the enacting State relating to insolvency] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g., claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims].

103. With the exception contained in paragraph (2), the article embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such proceeding, should not be treated worse than local creditors.

104. Paragraph (2) makes it clear that the principle of non-discrimination embodied in paragraph (1) leaves intact the provisions on the ranking of claims in insolvency proceedings, including any provisions that might assign a special ranking to claims of foreign creditors. It may be noted that few States currently have provisions assigning a special ranking to foreign creditors. However, lest the non-discrimination principle be emptied of its meaning by provisions giving the lowest ranking to foreign claims, paragraph (2) establishes the minimum ranking for claims of foreign creditors: the rank of general unsecured claims. The exception to that minimum ranking is provided for the cases where the claim in question, if it were of a domestic creditor, would be ranked lower than general unsecured claims (such low-rank claims may be, for instance, those of a State authority for financial penalties or fines, claims whose payment is deferred because of a special relationship between the debtor and the creditor, or claims that have been filed after the expiry of the time period for doing so). Those special claims may rank below the general unsecured claims, for reasons other than the nationality or location of the creditor, as provided in the law of the enacting State.

105. The alternative provision in the footnote differs from the provision in the text only in that it provides wording for States that refuse to recognize foreign tax and social security claims to continue to discriminate against such claims.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 190-192 (Commission, thirtieth session)
A/CN.9/435, paras. 151-156 (Working Group, twenty-first session)

A/CN.9/433, paras. 77-85 (Working Group, twentieth session)
A/CN.9/422, paras. 179-187 (Working Group, nineteenth session)

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

(1) Whenever under [identify laws of the enacting State relating to insolvency] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for their filing;
(b) indicate whether secured creditors need to file their secured claims; and
(c) contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

Paras. (1) and (2)

106. The main purpose of notifying foreign creditors as provided in paragraph (1) is to inform them of the commencement of the insolvency proceeding and of the time-limit to file their claims. Furthermore, as a corollary to the principle of equal treatment established by article 13, article 14 requires that foreign creditors should be notified whenever notification is required for creditors in the enacting State.

107. States have different provisions or practices regarding the methods for notifying creditors: those may be, for example, publication in the official gazette or in local newspapers, individual notices, affixing notices within the court premises or a combination of such procedures. If the form of notification were to be left to national law, foreign creditors would be in a less advantageous situation than local creditors, since they typically do not have direct access to local publications. For that reason, paragraph (2) in principle requires individual notification for foreign creditors, but nevertheless leaves discretion to the court to decide otherwise in a particular case (e.g., if individual notice would entail excessive cost or would not seem feasible under the circumstances).

108. With regard to the form of individual notification, States may use special procedures for notifications that have to be served in a foreign jurisdiction (e.g., sending of notifications through diplomatic channels). In the context of insolvency proceedings, those procedures would often be too cumbersome and time-consuming and their use would typically not provide foreign creditors timely notice concerning insolvency proceedings. It is therefore advisable for those notifications to be effected by such expeditious means that the court considers adequate. Those considerations are the reason for the provision in paragraph (2) that "no letters rogatory or other, similar formality is required".
109. Many States are party to bilateral or multilateral treaties on judicial cooperation, which often contain provisions on procedures for communicating judicial or extrajudicial documents to addressees abroad. A multilateral treaty of this kind is the Convention on the Service of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1965), adopted under the auspices of the Hague Conference on Private International Law. While the procedures envisaged by those treaties may constitute a simplification as compared to traditional communication via diplomatic channels, they would often be, for reasons stated in the preceding paragraph, inappropriate for cross-border insolvency cases. The question may arise whether paragraph (2), which allows the use of letters rogatory or similar formalities to be dispensed with, is compatible with these treaties. Each State would have to consider that question in light of its treaty obligations, but generally it may be said that the provision in paragraph (2) would not be in conflict with the international obligations of the enacting State, because the purpose of the treaties alluded to above is typically to facilitate communication and not to preclude use of notification procedures that are even simpler than those established by the treaty; for example, article 10 of the above-mentioned Convention states that

"Provided the State of destination does not object, the present Convention shall not interfere with

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

To the extent that there might still exist a conflict between the second sentence of paragraph (2) of this article and a treaty, article 3 of the Model Law provides the solution.

110. While paragraph (2) mentions letters rogatory as a formality that is not required for a notification under article 14, it may be noted that in many States such notifications would never be transmitted in the form of a letter rogatory. A letter rogatory in those States would be used for other purposes, such as to request evidence in a foreign country or to request permission to perform some other judicial act abroad. Such use of letters rogatory is governed, for example, by the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970), adopted under the auspices of the Hague Conference on Private International Law.

Paragraph (3)

111. In some legal systems a secured creditor who files a claim in the insolvency proceeding is deemed to have waived the security or some of the privileges attached to the credit, while in other systems failure to file a claim results in a waiver of such security or privilege. Where such a situation may arise, it would be appropriate for the enacting State to include in paragraph (3)(b) a requirement that the notification should include information regarding the effects of filing, or failing to file, secured claims.

Prior discussion in the Commission and the Working Group

Article 15. Application for recognition of a foreign proceeding

(1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

(2) An application for recognition shall be accompanied by:

(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative;

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article as a whole

112. The article defines the core procedural requirements for an application by a foreign representative for recognition. In incorporating the provision into national law, it is desirable not to encumber the process with additional requirements beyond those referred to. With article 15, in conjunction with article 16, the Model Law provides a simple, expeditious structure for a foreign representative to obtain recognition.

Paragraph (2) and article 16(2)

113. The Model Law presumes that documents submitted in support of the application for recognition need not be authenticated in any special way, in particular by legalization: according to article 16(2), the court is entitled to presume that those documents are authentic whether or not they have been legalized. "Legalization" is a term often used for the formality by which a diplomatic or consular agent of the State in which the document was to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

114. It follows from article 16(2) (according to which the court "is entitled to presume" the authenticity of documents accompanying the application for recognition) that the court retains discretion to decline to rely on the presumption of authenticity or to conclude that evidence to the contrary prevails.
This flexible solution takes into account the fact that the court may be able to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the court may be unwilling to act on the basis of a foreign document that has not been legalized, particularly when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (e.g. also because in some States they involve various authorities at different levels).

115. In respect of the provision relaxing any requirement of legalization, the question may arise whether this is in conflict with the unilateral obligations of the enacting State. Several States are parties to bilateral or multilateral treaties on mutual recognition and legalization of documents, such as the Convention Abolishing the Requirement of Legalisation for Foreign Documents (1961), adopted under the auspices of the Hague Conference on Private International Law, which provides specific simplified procedures for the legalization of documents originating from signatory States. However, similarly as noted above with respect to the use of letters rogatory and similar formalities, the treaties on legalization of documents in many instances leave in effect laws and regulations that have abolished or simplified legalization procedures; therefore a conflict is unlikely to arise. For example, the Hague Convention referred to provides in article 3(2):

"However, [legalisation] mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more contracting States have abolished or simplified it, or exempt the document itself from legalisation."

To the extent there might still exist a conflict between the Model Law and a treaty, according to article 3 of the Model Law, the treaty will prevail.

**Paragraph (2)(c)**

116. In order not to prevent recognition because of non-compliance with a mere technicality (e.g. where the applicant is unable to submit documents that in all details meet the requirements of paragraph (2)(a) and (b)), it is allowed by paragraph (2)(c) to take into account evidence other than that specified in subparagraphs (a) and (b): this provision, however, does not contemplate the court’s power to insist on the presentation of evidence acceptable to it. It is advisable to maintain that flexibility in enacting the Model Law. Article 16(2), which provides that the court “is entitled to presume” the authenticity of documents accompanying the application for recognition, applies also to documents submitted under paragraph (2)(c) (see paragraphs 114-115, above).

**Paragraph (3)**

117. Paragraph (3) requires that an application for recognition must be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. That information is needed by the court not so much for the decision on recognition itself but for any decision granting relief in favour of the foreign proceeding. Namely, in order to tailor such relief appropriately and make sure that relief is consistent with any other insolvency proceedings concerning the same debtor, the court needs to be aware of all foreign proceedings concerning the debtor which may be under way in third States.

118. An express provision establishing this duty to inform is useful, firstly, because the foreign representative is likely to have more comprehensive information about the debtor’s affairs in third States than the court and, secondly, because the foreign representative may be primarily concerned with obtaining relief in favour of his or her foreign proceeding and less concerned about coordination with another foreign proceeding. (The duty to inform the court about a foreign proceeding that becomes known to the foreign representative after the decision on recognition is set out in article 18; as to coordination of more than one foreign proceeding, see article 30.)

**Paragraph (4)**

119. Paragraph (4) entitles, but does not compel, the court to require a translation of some or all documents accompanying the application for recognition. If this discretion is compatible with the procedures of the court, it is useful since it allows, when the court understands the documents, to shorten the time needed for a decision on recognition and reduces costs.

**Notice**

120. Different solutions exist also as to whether the court is required to issue notice of an application for recognition. In a number of jurisdictions, fundamental principles of due process, in some cases enshrined in the constitution, may be understood as requiring that a decision of the importance of the recognition of a foreign insolvency proceeding could only be made after hearing the affected parties. However, in other States it is considered that applications for recognition of foreign proceedings require expeditious treatment (as they are often submitted in circumstances of imminent danger of dissipation or concealment of the assets) and that, because of this need for expeditiousness, the issuance of notice prior to any court decision on recognition is not required. In that vein of thinking, imposing the requirement would cause undue delay and would be inconsistent with article 17(3), which provides that an application for recognition of a foreign proceeding should be decided upon at the earliest possible time.

121. Procedural matters related to such notice are not resolved by the Model Law and are thus governed by other provisions of law of the enacting State. The absence of an express reference to notice of the filing of an application for recognition or of the decision to grant recognition does not preclude the court from issuing such notice, where legally required, in pursuance of its own rules on civil or insolvency proceedings. By the same token, there is nothing in the Model Law that would mandate the issuance of such notice, where such requirement does not exist.

**Prior discussion in the Commission and the Working Group**

A/53/17, paras. 199-209 (Commission, thirteenth session)
A/CN.9/435, paras. 165-175 (Working Group, twenty-first session)
A/CN.9/433, paras. 59-67, 99-104 (Working Group, twentieth session)
A/CN.9/422, paras. 76-93, 152-159 (Working Group, nineteenth session)
A/CN.9/419, paras. 62-69, 178-189 (Working Group, eighteenth session)

**Article 16. Presumptions concerning recognition**

(1) If the decision or certificate referred to in article 15(2) indicates that the foreign proceeding is a proceeding within the meaning of article 2(a) and that the foreign representative is a person or body within the meaning of article 2(d), the court is entitled to so presume.
(2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

(3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

122. The article establishes presumptions that allow the court to expedite the evidentiary process; at the same time they do not prevent, in accordance with the applicable procedural law, calling for, or assessing, other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party.

123. For comments on paragraph (2), which dispenses with the requirement of legalization, see above, paragraphs 113 to 115.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 204-206 (Commission, thirtieth session)
A/CN.9/435, paras. 170-172 (Working Group, twenty-first session)

Article 17. Decision to recognize a foreign proceeding

(1) Subject to article 6, a foreign proceeding shall be recognized if:

(a) the foreign proceeding is a proceeding within the meaning of article 2(a);

(b) the foreign representative applying for recognition is a person or body within the meaning of article 2(d);

(c) the application meets the requirements of article 15(2); and

(d) the application has been submitted to the court referred to in article 4.

(2) The foreign proceeding shall be recognized:

(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests, or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

(3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

(4) The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Paragraphs (1) to (3)

124. The purpose of the article is to indicate that, if recognition is not contrary to the public policy of the enacting State, and if the application meets the requirements set out in the article, recognition will be granted as a matter of course.

125. It is noteworthy that, apart from the public policy exception (see article 6), the conditions for recognition do not include those that would allow the court considering the application to evaluate the merits of the foreign court's decision by which the proceeding has been commenced or the foreign representative appointed. The foreign representative's ability to obtain early recognition (and the consequential ability to invoke in particular articles 20, 21, 22 and 24) is often essential for the effective protection of the assets of the debtor from dissipation and concealment. For that reason, paragraph (3) obligates the court to decide on the application "at the earliest possible time" and the court should in practice be able to conclude the recognition process within such a short period of time.

126. The article draws in paragraph (2) the basic distinction between foreign proceedings categorized as "main" proceedings and those foreign proceedings that are not so characterized, depending upon the jurisdictional basis of the foreign proceeding (see paragraph 75. above). The relief flowing from recognition may depend upon the category into which a foreign proceeding falls. For example, recognition of a "main" proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor (article 20(1)(a) and (b) and an automatic "freeze" of those assets (article 20(1)(c)), subject to certain exceptions referred to in article 20(2).

127. It is not advisable to include more than one criterion for qualifying a foreign proceeding as a "main" proceeding and provide that on the basis of any of those criteria a proceeding could be deemed a main proceeding. Such a "multiple criteria" approach would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding.

128. With regard to paragraph (2)(b), it has been pointed out above, in paragraph 73, that the Model Law does not envisage recognition of a proceeding commenced in a foreign State in which the debtor has assets but no establishment as defined in article 2(e).

 Paragraph (4)

129. A decision to recognize a foreign proceeding would normally be subject to review or rescission, as any other court decision. Paragraph (4) clarifies that the question of revisiting the decision on recognition, if grounds for granting it were fully or partially lacking or have ceased to exist, is left to the procedural law of the enacting State other than the provisions implementing the Model Law.

130. Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognized foreign proceeding has been terminated or its nature has changed (e.g. a reorganization proceeding might be transformed into a liquidation proceeding). Also, new facts might arise which require or justify a change of the court's decision, for example, if the foreign representative disregarded the conditions under which the court granted relief.

131. A decision on recognition may also be subject to review as to whether in the decision-making process the requirements for recognition were observed. Some appeal procedures under national laws give the appeal court the authority to review the merits of the case in its entirety, including factual aspects. It would be consistent with the purpose of the Model Law, and with the nature of the decision granting recognition (which is limited to verifying whether the applicant fulfilled the requirements of article 17), if an appeal of the decision would be limited to the question whether the requirements of articles 15 and 16 were observed in deciding to recognize the foreign proceeding.
Notice of decision to recognize foreign proceedings

132. As noted above (paragraphs 120-121), procedural matters regarding requirements of notice of the decision to grant recognition are not dealt with by the Model Law and are left to other provisions of law of the enacting State.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 29-33 and 201-202 (Commission, thirtieth session)
A/CN.9/435, paras. 167 and 173 (Working Group, twenty-first session)
A/CN.9/433, paras. 99-104 (Working Group, twentieth session)
A/CN.9/422, paras. 76-93 (Working Group, nineteenth session)
A/CN.9/419, paras. 62-69 (Working Group, eighteenth session)

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

(a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and

(b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Subparagraph (a)

133. It is possible that, after the application for recognition or after recognition, changes occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition. For example, the foreign proceeding may be terminated or transformed from a liquidation proceeding into a reorganization proceeding, or the terms of the appointment of the foreign representative may be modified or the appointment itself terminated. Subparagraph (a) takes into account the fact that technical modifications in the status of the proceedings or the terms of the appointment are frequent, but that only some of those modifications are such that they would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information of "substantial" changes. The court would likely be particularly anxious to be kept so informed when its decision on recognition concerns a foreign "interim proceeding" or a foreign representative has been "appointed on an interim basis" (see article 2(a) and (d)).

Subparagraph (b)

134. Article 15(3) requires that an application for recognition be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. Subparagraph (b) extends that duty to the time after the application for recognition has been filed. That information will allow the court to consider whether relief already granted should be coordinated with the existence of the insolvency proceedings that have been commenced after the decision on recognition (see article 30).

Prior discussion in the Commission

A/52/17, paras. 113-116, 201-202, 207 (Commission, thirtieth session)

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) staying execution against the debtor's assets;

(b) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) any relief mentioned in article 21(1)(c), (d) and (g).

(2) [Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]

(3) Unless extended under article 21(1)(f), the relief granted under this article terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Paragraph (1)

135. Article 19 deals with "urgently needed" relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition (unlike relief under article 21, which is also discretionary but which is available only upon recognition).

136. Article 19 authorizes the court to grant the type of relief that is usually available only in collective insolvency proceedings (i.e. the same type of relief available under article 21), as opposed to the "individual" type of relief that may be granted before the commencement of insolvency proceedings under rules of civil procedure (i.e. measures covering specific assets identified by a creditor). However, the discretionary "collective" relief under article 19 is somewhat more narrow than the relief under article 21.

137. The reason for the availability of collective measures, albeit in a restricted form, is that relief of a collective nature may be urgently needed already before the decision on recognition in order to protect the assets of the debtor and the interests of the creditors. Exclusion of collective relief would frustrate those objectives. On the other hand, recognition has not yet been granted and, therefore, the collective relief is restricted to urgent and provisional measures. The urgency of the measures is alluded to in the opening words of paragraph (1), while paragraph (1)(a) restricts the stay to execution proceedings, and the measure referred to in paragraph (1)(b) is restricted to perishable assets and assets susceptible to devaluation or otherwise in jeopardy. Otherwise, the measures available under article 19 are essentially the same as those available under article 21.

Paragraph (2)

138. Laws of many States contain requirements for notice to be given (either by the insolvency administrator upon the order of the court or by the court itself) when relief of the type mentioned in article 19 is granted. Paragraph (2) is the location where the enacting State should make appropriate provision for such notice.
Paragraph (3)

139. Relief available under article 19 is provisional in that, as provided in paragraph (3), the relief terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure, as provided in article 21(1)(j). The court might wish to do so, for example, to avoid a hiatus between the provisional measure issued before recognition and the measure issued after recognition.

Paragraph (4)

140. Paragraph (4) pursues the same objective as the one underlying article 30(a), namely that, if there is a foreign main proceeding pending, any relief granted in favour of a foreign non-main proceeding must be consistent (or should not interfere) with the foreign main proceeding. In order to foster such coordination of pre-recognition relief with any foreign main proceeding, the foreign representative applying for recognition is required, by article 15(3), to attach to the application for recognition a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 34-46 (Commission, thirtieth session)
A/CN.9/435, paras. 17-23 (Working Group, twenty-first session)
A/CN.9/433, paras. 110-114 (Working Group, twentieth session)
A/CN.9/422, paras. 116, 119, 122-123 (Working Group, nineteenth session)
A/CN.9/419, paras. 174-177 (Working Group, eighteenth session)

Article 20. Effects of recognition of a foreign main proceeding

(1) Upon recognition of a foreign proceeding that is a foreign main proceeding,

(a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) execution against the debtor's assets is stayed; and

(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

(2) The scope and the modification or termination, of the stay and suspension referred to in paragraph (1) of this article are subject to refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph (1) of this article.

(3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

(4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under [identify laws of the enacting State relating to insolvency] or the right to file claims in such a proceeding.

141. While relief under articles 19 and 21 is discretionary, the effects provided by article 20 are not, i.e. they flow automatically from recognition of the foreign main proceeding. Another difference between discretionary relief under articles 19 and 21 and the effects under article 20 is that discretionary relief may be issued in favour of main as well as non-main proceedings, while the automatic effects apply only to main proceedings.

142. In the States where an appropriate court order is needed for the effects of article 20 to become operative, the enacting State, in order to achieve the purpose of the article, should include (perhaps in the opening words of paragraph (1)) language directing the court to issue an order putting into effect the consequences specified in subparagraphs (a), (b) and (c) of paragraph (1).

143. The automatic consequences envisaged in article 20 are necessary to allow taking steps for organizing an orderly and fair cross-border insolvency proceeding. In order to achieve those benefits, it is justified to impose on the insolvent debtor the consequences of article 20 in the enacting State (i.e. the country where it maintains a limited business presence), even if the State where the centre of the debtor's main interests is situated poses different (possibly less stringent) conditions for the commencement of insolvency proceedings or even if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20 in the enacting State. This approach reflects a basic principle underlying the Model Law according to which recognition of foreign proceedings by the court of the enacting State grants effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. Recognition, therefore, has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State. If recognition should in a given case produce results that would be contrary to the legitimate interests of an interested party, including the debtor, the law of the enacting State should provide possibilities for protecting those interests, as indicated in article 20(2) (and discussed in paragraph 149, below).

144. By virtue of article 20(a), the effects of recognition extend also to foreign "interim proceedings". That solution is necessary since, as explained above in paragraph 69, interim proceedings (provided they meet the requisites of article 20(a)), should not be distinguished from other insolvency proceedings merely because they are of an interim nature. If after recognition the foreign "interim proceeding" ceases to have a sufficient basis for the automatic effects of article 20, the automatic stay could be terminated pursuant to the law of the enacting State, as indicated in article 20(2). (See also article 18, which deals with the obligation of the foreign representative "to inform the court promptly of any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment").

145. Paragraph (1)(a), by not distinguishing between various kinds of individual actions, also covers actions before an arbitral tribunal. Thus, article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement. This limitation is added to other possible limitations restricting the freedom of the parties to agree to arbitration which may exist in a national law (e.g. limits as to arbitrability or as to the capacity to conclude an arbitration agreement). Such limitations are not contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). However, bearing in mind the particularities of international arbitration, in particular its relative independence from the legal system of the State where the arbitral proceeding takes place, it might not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings. For example, if the arbitration does not take place in the enacting State and perhaps also not in the State of the main proceeding it may be difficult to enforce the stay of the arbitral proceed-
ings. Apart from that, the interests of the parties may be a reason for allowing an arbitral proceeding to continue, a possibility that is envisaged in paragraph (2) and left to the provisions of law of the enacting State.

146. Paragraph (1)(a) refers not only to "individual actions" but also to "individual proceedings" in order to cover, in addition to "actions" instituted by creditors in a court against the debtor or its assets, also enforcement measures initiated by creditors outside the court system, measures that creditors are allowed to take under certain conditions in some States. Paragraph (1)(b) has been added to make it abundantly clear that executions against the assets of the debtor are covered by the stay.

147. The Model Law does not deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under paragraph 20(1)(c). Those sanctions vary among legal systems, and might include criminal sanctions, penalties and fines, or the acts themselves might be void or capable of being set aside. It should be noted that, from the viewpoint of creditors, the main purpose of such sanctions is to facilitate recovery for the insolvency proceedings of any assets improperly transferred by the debtor and that, for that purpose, the setting aside of such transactions is preferable to the imposition of criminal or administrative sanctions on the debtor.

Paragraph (2)

148. Notwithstanding the "automatic" or "mandatory" nature of the effects under article 20, it is expressly provided that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State. Those exceptions may be, for example, the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, initiation of court actions for claims that have arisen after the commencement of the insolvency proceeding (or after recognition of a foreign main proceeding), or completion of open financial-market transactions.

149. Sometimes it may be desirable for the court to modify or terminate the effects of article 20. The rules governing the power of the court to do so vary. In some legal systems courts are authorized to make individual exceptions upon request by an interested party, under conditions prescribed by local law, while in others the courts do not have that power, in line with the principle that, in general, courts do not have the power to set aside the application of a statutory rule of law. If courts are to be given such a power, some legal systems would normally require setting out grounds on which the court could modify or terminate the mandatory effects of recognition under article 20(1). In view of that situation, article 20(2) provides that the modification or termination of the stay and the suspension provided in the article is subject to the provisions of law of the enacting State relating to insolvency.

150. Generally, it is useful for persons that are adversely affected by the stay or suspension under article 20(1) to have an opportunity to be heard by the court, which should then be allowed to modify or terminate those effects. It would be consistent with the objectives of the Model Law if the enacting State would spell out, or refer to, the provisions that govern this question.

Paragraph (3)

151. The Model Law does not address the question whether the limitation period for a claim ceases to run when the claimant is unable to commence individual proceedings as a result of article 20(1)(a). A harmonized rule on that question would not be feasible. However, since it is necessary to protect creditors from losing their claims because of a stay pursuant to article 20(1)(a), paragraph (3) has been added to authorize the commencement of individual actions to the extent necessary to preserve claims against the debtor. Once the claim has been preserved, the action continues to be covered by the stay.

152. Paragraph (3) might seem unnecessary in a State where a demand for payment or performance served by the creditor on the debtor causes the cessation of the running of the limitation period or where the stay of the kind envisaged in paragraph (1)(a) triggers such cessation. However, also in such States paragraph (3) may still be useful because the question of the cessation of the running of the limitation period might, pursuant to conflict-of-laws rules, be governed by the law of a State other than the enacting State; furthermore, the paragraph would be useful as assurance to foreign claimants that their claims would not be prejudiced in the enacting State.

Paragraph (4)

153. Paragraph (4) merely clarifies that the automatic stay and suspension pursuant to article 20 do not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and to participate in that proceeding. The right to apply to commence a local insolvency proceeding and to participate in it is in a general way dealt with in articles 11, 12 and 13. If a local proceeding is indeed initiated, article 29 deals with the coordination of the foreign and the local proceedings.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 47-60 (Commission, thirtieth session)
A/CN.9/435, paras. 24-48 (Working Group, twenty-first session)
A/53/433, paras. 115-126 (Working Group, twentieth session)
A/54/422, paras. 94-110 (Working Group, nineteenth session)
A/55/419, paras. 137-143 (Working Group, eighteenth session)

Article 21. Relief that may be granted upon recognition of a foreign proceeding

(1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 20(1)(a);

(b) staying execution against the debtor's assets to the extent it has not been stayed under article 20(1)(b);

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under article 20(1)(c);

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
(f) extending relief granted under article 19(1);  

(g) granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

154. Post-recognition relief under article 21 is discretionary, as is pre-recognition relief under article 19. The types of relief listed in paragraph (1) are those that are typical or most frequent in insolvency proceedings; however, the list is not exhaustive in order not to restrict the court unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case.

155. The explanation relating to the use of the expressions “individual actions” and “individual proceedings” in article 20(1)(a) and to coverage of execution proceedings (see paragraphs 145-146, above) applies also to article 21(1)(a).

156. It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 22(2), according to which the court may subject the relief granted to conditions it considers appropriate.

**Paragraph (2)**

157. The “turnover” of assets to the foreign representative (or another person), as envisaged in paragraph (2), is discretionary. It should be noted that the Model Law contains several safeguards designed to ensure the protection of local interests, before assets are turned over to the foreign representative. Those safeguards include: the general statement of the principle of protection of local interests in article 22(1); the provision in article 21(2) that the court should not authorize the turnover of assets until it is assured that the local creditors’ interests are protected; and article 22(2), according to which the court may subject the relief it grants to conditions it considers appropriate.

**Paragraph (3)**

158. One salient factor to be taken into account in tailoring the relief is whether it is for a foreign main or non-main proceeding. It is necessary to bear in mind that the interests and the authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding, who normally seeks to gain control over all assets of the insolvent debtor. Paragraph (3) reflects that idea by providing (a) that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding, and (b) if the foreign representative seeks information concerning the debtor’s assets or affairs, the relief must concern information required in that proceeding. The objective is to admonish the court that relief in favour of a foreign non-main proceeding should not give unnecessarily broad powers to the foreign representative and that such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

159. The proviso “under the law of this State” reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State. Rather, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State.

160. The idea underlying article 21(3) has been reflected also in article 19(4) (pre-recognition relief), article 29(c) (coordination of a foreign proceeding with a local proceeding) and article 30 (coordination of more than one foreign proceeding).

**Prior discussion in the Commission and the Working Group**

A/52/17, paras. 61-73 (Commission, thirtieth session)  
A/CN.9/425, paras. 49-61 (Working Group, twenty-first session)  
A/CN.9/433, paras. 127-134, 138-139 (Working Group, twentieth session)  
A/CN.9/422, paras. 111-113 (Working Group, nineteenth session)  
A/CN.9/419, paras. 148-152, 154-166 (Working Group, eighteenth session)

**Article 22. Protection of creditors and other interested persons**

(1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph (3) of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

(2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

(3) The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

161. The idea underlying article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief. This balance is essential to achieve the objectives of cross-border insolvency legislation.

162. The reference to the interests of creditors, the debtor and other interested parties in paragraph (1) provides useful elements to guide the court in exercising its powers under article 19 or 21. In order to allow the court to tailor better the relief, the court is clearly authorized to subject the relief to conditions (paragraph (2)) and to modify or terminate the relief granted (paragraph (3)). An additional feature of paragraph (3) is that it expressly gives standing to the parties who may be affected by the consequences of articles 19 and 21 to petition the court to modify and terminate those consequences. Apart from that, the article is intended to operate in the context of the procedural system of the enacting State.

163. In many cases the affected creditors will be “local” creditors. Nevertheless, in enacting article 22, it is not advis-
able to attempt to limit it to local creditors. Any express reference to local creditors in paragraph (1) would require a definition of those creditors. An attempt to draft such a definition (and to establish criteria according to which a particular category of creditors might receive special treatment) would not only show the difficulty of crafting such a definition but would also reveal that there is no justification for discriminating creditors on the basis of criteria such as place of business or nationality.

164. Protection of all interested persons is linked to provisions in national laws on notification requirements; those may be general publicity requirements, designed to apprise potentially interested persons (e.g. local creditors or local agents of a debtor) that a foreign proceeding has been recognized, or there may be requirements for individual notifications which the court, under its own procedural rules, has to issue to persons that would be directly affected by recognition or relief granted by the court. National laws vary as to the form, time and content of notice required to be given of the recognition of foreign proceedings, and the Model Law does not attempt to modify those laws (see also paragraph 152, above).

Prior discussion in the Commission and the Working Group
A/52/17, paras. 82-93 (Commission, thirtieth session)
A/CN.9/435, paras. 72-78 (Working Group, twenty-first session)
A/52/17, paras. 140-146 (Working Group, twentieth session)
A/52/17, para. 113 (Working Group, nineteenth session)

Article 23. Actions to avoid acts detrimental to creditors

(1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate (refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation).

(2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

165. Under many national laws both individual creditors and insolvency administrators have a right to bring actions to avoid or otherwise render ineffective acts detrimental to creditors. Such a right, insofar as it pertains to individual creditors, is often not governed by insolvency law but by general provisions of law (such as the Civil Code); the right is not necessarily tied to the existence of an insolvency proceeding against the debtor so that the action may be instituted prior to the commencement of such a proceeding. The person having such a right is typically only an affected creditor and not another person such as the insolvency administrator. Furthermore, the conditions for these individual-creditor actions are different from the conditions applicable to similar actions that might be initiated by an insolvency administrator. It should be noted that the procedural standing conferred by article 23 extends only to actions that are available to the local insolvency administrator in the context of an insolvency proceeding, and that the article does not equate the foreign representative with individual creditors who may have similar rights under a different set of conditions. Such actions of individual creditors fall outside the scope of article 23.

166. The Model Law expressly provides that a foreign representative has "standing" (a concept in some systems referred to as "active procedural legitimation", "active legitimation" or "legitimation") to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is drafted narrowly in that it does not create any substantive right regarding such actions and also does not provide any conflict-of-laws solution. The effect of the provision is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency administrator appointed in the enacting State.

167. Granting procedural standing to the foreign representative to institute such actions is not without difficulty. In particular, such actions might not be looked upon favourably because of their potential for creating uncertainty about concluded or performed transactions. However, since the right to commence such actions is essential to protect the integrity of the assets of the debtor and is often the only realistic way to achieve such protection, it has been considered important to ensure that such right would not be denied to a foreign representative on the sole ground that he or she has not been locally appointed.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 210-216 (Commission, thirtieth session)
A/52/17, para. 134 (Working Group, twentieth session)

Article 24. Intervention by a foreign representative in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

168. The purpose of the article is to avoid the denial of standing to the foreign representative "to intervene" in proceedings merely because the procedural legislation may not have contemplated the foreign representative among those having such standing. The article applies to foreign representatives of both main and non-main proceedings.

169. The word "intervene" in the context of article 20 is intended to refer to the case where the foreign representative appears in court and makes representations in proceedings, whether those proceedings be individual court actions or other proceedings (including extrajudicial proceedings) instituted by the debtor against a third party, or proceedings instituted by a third party against the debtor. The proceedings where the foreign representative might intervene could only be those that have not been stayed under articles 20(1)(a) or 21(1)(a).

170. The article, limited to providing procedural standing, makes it clear (by stating "provided the requirements of the law of this State are met") that all other conditions of the local law for a person to be able to intervene remain intact.

171. Many if not all national procedural laws contemplate cases where a party (the foreign representative in this article) who demonstrates a legal interest in the outcome of a dispute between two other parties may be permitted by the court to be heard in the proceedings. Those procedural laws refer to such situations by different expressions, among which the expression "intervention" is frequently used. If the enacting State uses another expression for that concept, the use of such other expression in enacting article 24 would be appropriate.
172. It should be noted that the expression “participate” as used in the context of article 12 refers to a case where the foreign representative takes part in proceedings concerning an individual action by or against the debtor.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 117-123 (Commission, thirtieth session)
A/CN.9/433, paras. 51, 58 (Working Group, twentieth session)
A/CN.9/435, paras. 79-84 (Working Group, twenty-first session)
A/CN.9/422, paras. 148-149 (Working Group, nineteenth session)

Chapter IV. Cooperation with foreign courts and foreign representatives

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

(1) In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a person or body administering a reorganization or liquidation under the law of the enacting State.

(2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives

(1) In matters referred to in article 1, a person or body administering a reorganization or liquidation under the law of the enacting State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

(2) The [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

(a) appointment of a person or body to act at the direction of the court;

(b) communication of information by any means considered appropriate by the court;

(c) coordination of the administration and supervision of the debtor’s assets and affairs;

(d) approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) coordination of concurrent proceedings regarding the same debtor;

(f) [the enacting State may wish to list additional forms or examples of cooperation].

Chapter IV as a whole

173. Chapter IV (articles 25-27) on cross-border cooperation is a core element of the Model Law. Its objective is to enable courts and insolvency administrators from two or more countries to be efficient and achieve optimal results. Cooperation as described in the chapter is often the only realistic way, for example, to prevent dissipation of assets; to maximize the value of assets (e.g. when items of production equipment located in two States are worth more if sold together than if sold separately); or to find the best solutions for the reorganization of the enterprise.

174. Articles 25 and 26 not only authorize cross-border cooperation, they also mandate it by providing that the court and the insolvency administrator “shall cooperate to the maximum extent possible”. These articles are designed to overcome a widespread lack in national laws of rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies. Enactment of such a legal basis would be particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. However, even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative framework for cooperation has proven to be useful.

175. To the extent that cross-border judicial cooperation in the enacting State is based on principles of comity among nations, the enactment of articles 25 to 27 offers an opportunity for making this principle more concrete and adapted to the particular circumstances of cross-border insolvencies.

176. In the States in which the proper legal basis for international cooperation in the area of cross-border insolvency is not the principle of “comity”, but an international agreement (e.g. a bilateral or multilateral treaty or an exchange of letters between the cooperating authorities) based on the principle of reciprocity, chapter IV of the Model Law may serve as a model for the elaboration of such international cooperation agreements.

177. The articles leave the decision as to when and how to cooperate to the courts and, subject to the supervision of the courts, to the insolvency administrators. For a court (or a person or body referred to in articles 25 and 26) to cooperate with a foreign court or a foreign representative regarding a foreign proceeding, the Model Law does not require a previous formal decision to recognize that foreign proceeding.

178. The ability of courts, with appropriate involvement of the parties, to communicate “directly” and to request information and assistance “directly" from foreign courts or foreign representatives is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. This ability is critical when the courts consider that they should act with urgency. In order to emphasize the flexible and potentially urgent character of cooperation, the enacting State may find it useful to include in the enactment of the Model Law an express provision that would authorize the courts, when they engage in cross-border communications under article 25, to forgo use of the formalities (e.g. communication via higher courts, letters
The importance of granting the courts flexibility and discretion in cooperating with foreign courts or foreign representatives was emphasized at the Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency. At that Colloquium, reports of a number of cases in which judicial cooperation in fact occurred were given by the judges involved in the cases. From those reports a number of points emerged, which might be summarized as follows: (a) communication between courts is possible, but should be done carefully and with appropriate safeguards for the protection of substantive and procedural rights of the parties; (b) communication should be done openly, with advance notice to the parties involved and in the presence of those parties, except in extreme circumstances; (c) communications that might be exchanged are various and include: exchanges of formal court orders or judgments; supply of informal writings of general information, questions and observations; and transmission of transcripts of court proceedings; (d) means of communication include, for example, telephone, facsimile, electronic-mail facilities and video; and (e) where communication is necessary and is intelligently used, there could be considerable benefits for the persons involved in, and affected by, the cross-border insolvency. The Colloquium was held from 22 to 23 March 1997 in conjunction with the 5th World Congress of the International Association of Insolvency Practitioners (INSOL) (New Orleans, 23 to 26 March 1997). A brief account of the Colloquium appears in the report of the Commission on the work of its thirtieth session.\(^4\)

**Article 26**

180. Inclusion of article 26 on international cooperation between persons who are appointed to administer assets of insolvent debtors reflects the important role that such persons can play in devising and implementing cooperative arrangements, within the parameters of their authority. The provision makes it clear that an insolvency administrator acts under the overall supervision of the competent court (by stating “in the exercise of its functions and subject to the supervision of the court”). The Model Law does not modify the rules already existing in the insolvency law of the enacting State on the supervisory functions of the court over the activities of the insolvency administrator. Generally, a certain degree of latitude and initiative of administrators, within the broad confines of judicial supervision, are mainstays of cooperation in practical terms; it is therefore advisable that the enacting State does not change that in enacting the Model Law. In particular, there should be no suggestion that ad hoc authorization would be needed for each communication between the administrator and a foreign body.

**Article 27**

181. Article 27 is suggested to be used by the enacting State to provide courts with an indicative list of the types of cooperation that are authorized by articles 25 and 26. Such an indicative listing may be particularly helpful in States with a limited tradition of direct cross-border judicial cooperation, and in States where judicial discretion has traditionally been limited. Any listing of forms of possible cooperation should not purport to be exhaustive, as this might inadvertently preclude certain forms of appropriate cooperation.

182. The implementation of cooperation would be subject to any mandatory rules applicable in the enacting State; for example, in the case of requests for information, rules restricting the communication of information (e.g. for reasons of protection of privacy) would apply.

183. Subparagraph (f) of article 27 is a slot where the enacting State may include additional forms of possible cooperation. Those might include, for example, suspension or termination of existing proceedings in the enacting State.

Prior discussion in the Commission and the Working Group
A/52/17, paras. 124-129 (Commission, thirtieth session)
A/50/435, paras. 85-94 (Working Group, twenty-first session)
A/50/433, paras. 164-172 (Working Group, twentieth session)
A/50/422, paras. 129-143 (Working Group, nineteenth session)
A/50/419, paras. 75-76, 80-83, 118-133 (Working Group, eighteenth session)

Chapter V. Concurrent proceedings

**Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding**

After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

184. Article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State.

185. The position taken in article 28 is in substance the same as the position taken in a number of States. However, in some States for the court to have jurisdiction to commence a local insolvency proceeding, the mere presence of assets in the State is not sufficient. For such jurisdiction to exist, the debtor must be engaged in an economic activity in the State (to use the terminology of the Model Law, the debtor must have an “establishment” in the State, as defined in article 2(f)). The Model Law opted in this article for the less restrictive solution in a context where the debtor is already involved in a foreign main proceeding. While the solution leaves a broad ground for commencing a local proceeding after recognition of a foreign main proceeding, it serves the purpose of indicating that if the debtor has no assets in the State there is no jurisdiction for commencing an insolvency proceeding.

186. Nevertheless, the enacting State may wish to adopt the more restrictive solution, i.e. allowing the initiation of the local proceeding only if the debtor has an "establishment" in the State. The rationale may be that, when the assets in the enacting State are not part of an establishment, the commencement of a local proceeding would typically not be the most efficient way to protect the creditors, including local creditors. By tailoring relief to be granted to the foreign main proceeding and cooperating with the foreign court and foreign representative, the court in the enacting State would have sufficient

\(^4\)Ibid., paras. 17-22
opportunities to ensure that the assets in the State would be administered in such a way that local interests would be adequately protected. Therefore, the enacting State would act in line with the philosophy of the Model Law if it enacts the article by replacing the words "only if the debtor has assets in this State", as they currently appear in article 28, with the words "only if the debtor has an establishment in this State".

187. Ordinarily, the local proceeding of the kind envisaged in the article would be limited to the assets located in the State. However, in some situations a meaningful administration of the local insolvency proceeding may have to include certain assets abroad, especially when there is no foreign proceeding necessary or available in the State where the assets are situated (for example: where the local establishment would have an operating plant in a foreign jurisdiction; where it would be possible to sell the debtor’s assets in the enacting State and the assets abroad as a "going concern"; or where assets were fraudulently transferred abroad from the enacting State). In order to allow such limited cross-border reach of a local proceeding, the article includes at the end of paragraph (1) the words "and such other property as may be appropriately administered within the proceedings in this State". Two restrictions have been included in the article concerning the possible extension of effects of a local proceeding to assets located abroad: firstly, the extension is permissible "to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27", and, secondly, those foreign assets must be subject to administration in the enacting State "under the law of [the enacting State]". Those restrictions are useful in order to avoid creating an open-ended faculty to extend the effects of a local proceeding to assets located abroad, a faculty that would generate uncertainty as to the application of the provision and may lead to conflicts of jurisdiction.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 94-101 (Commission, thirtieth session)
A/CN.9/435, paras. 180-183 (Working Group, twenty-first session)
A/CN.9/433, paras. 173-181 (Working Group, twentieth session)
A/CN.9/422, paras. 192-197 (Working Group, nineteenth session)

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

Where a foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) when the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,
(i) any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and
(ii) if the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;
(b) when the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding:
(i) any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and
(ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in article 20(1) shall be modified or terminated pursuant to article 20(2) if inconsistent with the proceeding in this State;
(c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

188. The article gives guidance to the court that deals with cases where the debtor is subject to a foreign proceeding and a local proceeding at the same time. The opening words of the provision direct the court that in all such cases it must seek cooperation and coordination pursuant to chapter IV of the Model Law, i.e. articles 25, 26 and 27.

189. The salient principle embodied in this article is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This principle is essential for achieving the objectives of the Model Law in that it allows the court in the enacting State in all circumstances to provide relief in favour of the foreign proceeding.

190. However, the article maintains a pre-eminence of the local proceeding over the foreign proceeding. This has been done in the following ways: firstly, any relief to be granted to the foreign proceeding must be consistent with the local proceeding (subparagraph (a)(i)); secondly, any relief that has already been granted to the foreign proceeding must be reviewed and modified or terminated to ensure consistency with the local proceeding (subparagraph (b)(i)); thirdly, if the foreign proceeding is a main proceeding, the automatic effects pursuant to article 20 are to be modified and terminated if inconsistent with the local proceeding (those automatic effects do not terminate automatically since they may be beneficial, and the court may wish to maintain them) (subparagraph (b)(ii)); fourthly, where a local proceeding is pending at the time a foreign proceeding is recognized as a main proceeding, the foreign proceeding does not enjoy the automatic effects of article 20 (subparagraph (a)(ii)). The article avoids establishing a rigid hierarchy between the proceedings since that would unnecessarily hinder the ability of the court to cooperate and exercise its discretion under articles 19 and 21. It is desirable not to restrict that latitude of the court when the article is enacted.

191. Subparagraph (c) incorporates the principle that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding or must concern information required in that proceeding. This principle is expressed in article 21(3) (which deals in a general way with the type of relief that may be granted to a foreign representative) and is restated in this article (which deals with coordination of local and foreign proceedings). Article 19(4) (on pre-recognition relief) and article 30 (on coordination of more than one foreign proceeding) are inspired by the same principle. (See also comments, paragraph 140, above).

Prior discussion in the Commission and the Working Group

A/52/17, paras. 106-110 (Commission, thirtieth session)
A/CN.9/435, paras. 190-191 (Working Group, twenty-first session)
Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 23, 26 and 27, and the following shall apply:

(a) any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

192. The article deals with cases where the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies whether or not an insolvency proceeding is pending in the enacting State. If in addition to two or more foreign proceedings there is a proceeding in the enacting State, the court will have to act pursuant to both articles 29 and 30.

193. The objective of article 30 is similar to the objective of article 29 in that the key issue in the case of concurrent proceedings is to promote cooperation, coordination and consistency of relief granted to different proceedings. Such consistency will be achieved by appropriate tailoring of relief to be granted or by modifying or terminating relief already granted. Unlike article 29 (which as a matter of principle gives primacy to the local proceeding), article 30 gives preference to the foreign main proceeding if there is one. In the case of more than one foreign non-main proceeding, the provision does not a priori treat any foreign proceeding preferentially. Priority for the foreign main proceeding is reflected in the requirement that any relief in favour of a foreign non-main proceeding (whether already granted or to be granted) must be consistent with the foreign main proceeding (subparas. (a) and (b)).

Prior discussion in the Commission
A/52/17, paras. 111-112 (Commission, thirtieth session)

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [identify laws of the enacting State relating to insolvency], proof that the debtor is insolvent.

194. In some jurisdictions proof that the debtor is insolvent is required for the commencement of insolvency proceedings. In other jurisdictions insolvency proceedings may be commenced under specific circumstances defined by law which do not necessarily mean that the debtor is in fact insolvent; those circumstances may be, for example, cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissolution of its assets or abandonment of its establishment.

195. In jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of a foreign main proceeding, a rebuttable presumption of insolvency of the debtor for the purposes of commencing an insolvency proceeding in the enacting State. The presumption does not apply if the foreign proceeding is a non-main proceeding. The reason is that an insolvency proceeding commenced in a State other than the State where the debtor has the centre of its main interests does not necessarily mean that the debtor is to be subject to laws relating to insolvency in other States.

196. For the national laws where proof that the debtor is insolvent is not required for the commencement of insolvency proceedings, the presumption established in article 31 may be of little practical significance and the enacting State may decide not to enact it.

197. The article would have particular significance when proving insolvency as the prerequisite for an insolvency proceeding would be a time-consuming exercise and of little additional benefit bearing in mind that the debtor is already in an insolvency proceeding in the State where it has the centre of its main interests and the commencement of a local proceeding may be urgently needed for the protection of local creditors. Nonetheless, the court of the enacting State is not bound by the decision of the foreign court, and local criteria for demonstrating insolvency remain operative, as is clarified by the words "in the absence of evidence to the contrary".

Prior discussion in the Commission and the Working Group
A/52/17, paras. 94, 102-105 (Commission, thirtieth session)
A/CN.9/435, paras. 180, 184 (Working Group, twenty-first session)
A/CN.9/433, paras. 173, 180-189 (Working Group, twentieth session)
A/CN.9/422, para. 196 (Working Group, nineteenth session)

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [identify laws of the enacting State relating to insolvency] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

198. The rule set forth in article 32 (sometimes referred to as the "hotchpot" rule) is a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. For example, an unsecured creditor has received 5 per cent of its claim in a foreign insolvency proceeding; that creditor also participates in the insolvency proceeding in the enacting State, where the rate of distribution is 15 per cent; in order to put the creditor in the equal position as the other creditors in the enacting State, the creditor would receive 10 per cent of its claim in the enacting State.
199. The article does not affect the ranking of claims as established by the law of the enacting State, and is solely intended to establish the equal treatment of creditors of the same class. To the extent claims of secured creditors or creditors with rights *in rem* are paid in full (a matter that depends on the law of the State where the proceeding is conducted), those claims are not affected by the provision.

200. The expression "secured claims" is used to refer generally to claims guaranteed by particular assets, while the words "rights *in rem*" are intended to indicate rights relating to a particular property that are enforceable also against third parties. A given right may fall within the ambit of both expressions, depending on the classification and terminology of the applicable law. The enacting State may use another term or terms for expressing these concepts.

Prior discussion in the Commission and the Working Group

A/52/17, paras. 130-134 (Commission, thirtieth session)
A/CN.9/435, paras. 96, 197-198 (Working Group, twenty-first session)
A/CN.9/433, paras. 182-183 (Working Group, twentieth session)
A/CN.9/422, paras. 198-199 (Working Group, nineteenth session)
A/CN.9/419, paras. 89-93 (Working Group, eighteenth session)

VI. ASSISTANCE FROM THE UNCITRAL SECRETARIAT

(a) Assistance in drafting legislation

201. The UNCITRAL secretariat may assist States with technical consultations for the preparation of legislation based on the Model Law. Further information may be obtained from: the UNCITRAL secretariat, Vienna International Centre, P.O. Box 500, A-1400 Vienna, Austria; telephone (43-1) 26060-4060; fax (43-1) 26060-5813; electronic mail: unciusal@unov.un.or.at; Internet home page: http://www.un.or.at/unctripal.

(b) Information on interpretation of legislation based on the Model Law

202. Once enacted, the Model Law will be included in the system for collecting and disseminating information on case law relating to the Conventions and Model Laws that have emanated from the work of the Commission (Case Law on UNCITRAL Texts (CLOUT)). The purpose of the system is to promote international awareness of the legislative texts formulated by the Commission and to facilitate their uniform interpretation and application. The secretariat publishes, in the six languages of the United Nations, abstracts of decisions and makes available, against reimbursement of copying expenses, the original decisions on the basis of which the abstracts were prepared. The system is explained in the User’s Guide (A/CN.9/SER.C/GUIDE/1), available from the secretariat and at the Internet home page indicated in the preceding paragraph.
III. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE PREPARATION OF THE DRAFT UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

Summary record (partial)* of the 607th Meeting

Monday, 12 May 1997, at 10 a.m.

[A/CN.9/SR.607]

Chairman: Mr. BOSSA (Uganda)

The discussion covered in the summary record began at 10.50 a.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (A/CN.9/435)

General remarks
1. Mr. SEKOLEC (International Trade Law Branch) introduced the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency prepared by the Working Group on Insolvency Law (A/CN.9/435, annex). The practical problems in that area of law had been first discussed in the Commission in 1993. The topic had been suggested by the Secretariat as the result of observations and suggestions made in 1992 at the UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century. Several references had been made there to the difficulties which arose in insolvency cases where the debtor had assets in more than one State.

2. The discussion at the Congress and in the Commission in 1993 had highlighted the need for caution, bearing in mind the failed attempts at harmonization in other forums. It had been considered preferable to begin with work on topics that lent themselves to harmonization. Substantive rules of national laws on insolvency could not readily be harmonized.

3. The Commission had asked the Secretariat to study the issue further. The Secretariat had contacted relevant international organizations with expertise in the area, and had worked particularly closely with the International Association of Insolvency Practitioners (INSOL). In April 1994, UNCITRAL and INSOL had held a Colloquium on Cross-Border Insolvency with the aim of identifying the problems and considering possible solutions. The outcome had been the suggestion that the Commission should confine itself to considering possible rules in three areas:
   (a) judicial cooperation between courts supervising insolvent debtors in more than one country;
   (b) access of foreign insolvency administrators to courts in the States enacting the rules;
   (c) the recognition of foreign proceedings in enacting States, and the effects to be given to those proceedings.

4. At the first Colloquium, it had been recognized that all the rules would basically be addressed to judges, and that judges should be involved in the discussions. For that purpose, UNCITRAL and INSOL had convened a Judicial Colloquium on Cross-Border Insolvency in March 1995. The views of the participating judges and government officials had been in line with those that had emerged at the 1994 Colloquium. Armed with those views, the Commission, at its twenty-eighth session in May 1995, had decided that uniform rules should be prepared to cover the three areas in question, and had asked its third Working Group to prepare such rules. That Group, now called the Working Group on Insolvency Law, had devoted four two-week sessions to the project, and the draft Model Legislative Provisions on Cross-Border Insolvency prepared by it, and now before the Commission, were annexed to the report on the last of those sessions (the Working Group's twenty-first session) (A/CN.9/435).

5. At its twentieth session, the Working Group had discussed the form that the instrument being prepared should take. The widely prevailing view had been that a model national statute, or set of legislative provisions, would be appropriate to give judicial cooperation a clearer legal framework. An international treaty, on the other hand, would require a cumbersome process of adoption. The issue concerned national procedural law, an area of law which was not easy to harmonize through treaties. For the sake of speed, model legislation was generally considered the preferable solution. Nevertheless, some had expressed the view that certain aspects of the subject would be more appropriately dealt with in an international treaty. If, after adopting model legislation, the Commission felt there was a need for an international treaty, that could be discussed and decided at a later stage.

6. After the last session of the Working Group, in January 1997, the Secretariat, in cooperation with INSOL, had convened another Judicial Colloquium; it had been held in March 1997, in conjunction with the 5th World Congress of INSOL, and had lasted two days. The participants had been mainly judges, with some national regulators and government officials. The Colloquium had considered the draft Model Provisions, and there had been general support for the idea of model legislation, and for the substance of the text.

7. Lastly, in line with some of the more recent model laws prepared by the Commission, the Working Group had felt that it would be good to prepare an accompanying Guide to Enactment, to assist legislators in transposing the model text into

*No summary record was prepared for the rest of the meeting.
national law. It would not be a commentary on the text or attempt to interpret it, but would be intended to aid the legislative process, although it might also be useful to practitioners. The Secretariat had prepared a draft of the Guide, but it had not yet been translated into all the official languages.

8. The CHAIRMAN pointed out that, as explained in paragraph 16 of its report (A/CN.9/435), the Working Group would have wished to have more time available for completing its review of the draft, but had decided, in line with the hope expressed by the Commission at its twenty-ninth session, to submit the draft Model Legislative Provisions to it for consideration and completion at its thirtieth session. The Working Group suggested that the Commission begin its considerations with article 14 and the following articles.

9. If there were no other suggestions, therefore, he proposed to start the discussion of the text with article 14. First, however, he invited general observations.

10. Mr. CHOUKRI SBAI (Observer for Morocco) said that the draft would be of great importance in protecting the rights of creditors. He noted that the title chosen by the Working Group was "Draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency", implying that the instrument being prepared would take the form of a model law. However, he did not think that a decision had yet been taken between a treaty and a model law. Was that issue still open for discussion?

11. Mr. SEKOLEC (International Trade Law Branch) drew attention to the considerations of the Working Group on that point, as summarized in its report on its twentieth session (A/CN.9/433), in paragraphs 16-20, and particularly to the Working Group's suggestion in paragraph 20 that the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency should be considered at a later stage.

12. Mr. SABO (Observer for Canada) expressed the hope that the work would be completed in the time available. She supported the suggestion to start with article 14, which would allow the Commission to discuss key provisions early on, and then deal with the others later.

13. Mr. TELL (France) said that he saw no particular need to begin the discussion with article 14 since, although it contained the core of the text, there were also important questions to settle in articles 1-13.

14. The CHAIRMAN said the intention was that the Commission should cover all the articles in the session.

15. Mr. COOPER (Observer for the International Association of Insolvency Practitioners) informed the Commission that a short report, unfortunately only in English, on the Judicial Colloquia was available on request. A full transcript would be ready by June 1997.

16. Considering the annual value of international trade, the enormous losses due to international insolvencies and the numbers of jobs lost, it was regrettable that a body such as UNCITRAL should be short of resources.

17. Mr. BURMAN (United States of America) said that he had understood that the Working Group had agreed that the instrument to be discussed at the present session would be a model law. He hoped that the important work would be completed at the session. The Commission could revisit the issue, perhaps at its next session, to see if there was a sufficient degree of acceptance to consider recasting the model law as a multilateral treaty or convention. He would certainly engage actively in the discussion. In the meantime, it was very important to complete the project at the current session of the Commission. To accomplish that for an instrument other than a model law, such as a treaty, would require at least one more session of the Working Group plus one more session of the Commission.

18. Mr. SEKOLEC (International Trade Law Branch) explained that the text elaborated by the Working Group had been drafted as model legislation and contained many provisions which would not be in a treaty, and which would need to be deleted or changed, and new provisions would have to be added. Preparation of a treaty would be a different project in many ways.

19. Ms. INGRAM (Australia) said that she strongly supported the basic thrust of the text prepared by the Working Group. She believed that it would make a real difference to the cross-border administration of insolvency, especially the regime whereby recognition was a simple, straightforward process with no inherent effects except in a very few cases—just a gateway to cooperation.

20. She strongly supported the minimum standard set of relief measures available to foreign administrators following recognition, to facilitate worldwide administration of insolvent enterprises. She also welcomed the emphasis on cooperation at all levels, and predictable and swift access to remedies.

21. She agreed with the proposal to start with article 14, which was the first of the articles on recognition and relief. She also supported the views of the representative of the United States of America on the form of instrument.

22. Mr. YAMAMOTO (Japan) said that, in the previous year, his Government had begun preparatory work on amending the rules on insolvency procedures, with cross-border insolvency as a major issue. Although there was room for improvement in the draft, he hoped that the Model Provisions plus the Guide to Enactment could be adopted at the session. Given the difficulty of harmonizing procedural rules, together with his country's special circumstances, he preferred a model law to a convention.

23. Mr. AL-NASSER (Saudi Arabia) said that document A/CN.9/435 had been examined by the authorities in his country, resulting in the conclusion that draft legislative provisions or a model law were preferable. A convention or treaty could prove difficult for some countries to accept. The intention from the outset had been to prepare model legislative provisions, not a convention.

24. Mr. ABASCAL (Mexico) doubted the wisdom of trying to complete the work at the present session. The adoption of model legislative provisions on international insolvency would be a very important step and was also a new topic. Governments were probably not fully aware of the work being done. The report of the last Working Group session had only recently been issued, allowing little time for consideration of the text. Nor had the draft Guide to Enactment of the Provisions been circulated in the official languages. It would be wise to allow the matter to mature a little longer, to ensure acceptance by the international community.

25. Mr. MAZZONI (Italy) supported the choice of a model law; it would not be the end of the matter, but would be an important first step. If there was wide enough support, more ambitious projects could be undertaken. He had expressed doubts concerning the plan to complete the work at the current session during the last Working Group session. Since, however, the decision had been taken to proceed, there should be a bona fide attempt to make as much progress as possible.
26. As to starting with article 14, all the provisions were linked to each other, and a start could equally well be made with article 2, for example. However, he believed that the consensus was that the provisions in articles 14-23 were the essential provisions of the model law, so he could support starting with article 14.

27. He suggested the inclusion of two ideas in article 14, under two separate paragraphs. The first paragraph would confine itself to indicating, in a restrictive manner, those few specific grounds on which recognition of a foreign proceeding might be refused. It would be a safety valve, allowing, for example, for the notion of public policy, i.e. referring to article 6.

28. The second paragraph would deal with the difficult issue of recognition applied for when, in the enacting jurisdiction, insolvency proceedings having the nature of a main proceeding were already pending. In that case, unless the model law took a differentiated approach, he thought that in certain countries, including his own, recognition of the foreign proceeding would simply be refused if the automatic consequences of article 16 were attached. He therefore suggested that it should be made simple and straightforward to obtain recognition when there was no local obstacle in the form of a local proceeding, and that provision should be made for recognition for the sole purpose of coordination when a local proceeding having the nature of a main proceeding was pending.

29. Mr. SEKOLEC (International Trade Law Branch) said he had a technical observation to make. One of the suggestions of the representative of Italy touched on the question of concurrent proceedings. The Secretariat had received a written proposal prepared by a number of delegations on concurrent proceedings which would be available in the official languages in a day or two. Italian proposals on article 14 and other articles had also been submitted in writing and would be available soon.

30. Mr. TER (Singapore) said that he had no difficulty with the suggestion that the Commission should complete the model law and then consider whether or not there should be an international treaty. His country, as a trading nation, relied heavily on trade, and realized that the harmonization of trade law was of critical importance.

31. Mr. BERENDS (Observer for the Netherlands) said, on the issue of a treaty or model legislation, that a treaty might be preferable, but he doubted whether it was achievable. All wanted progress towards a convention, but the Model Provisions were a necessary step on the way, and he thus supported them. He preferred to take article 14, the core of the work, as a starting point.

32. Ms. NIKANJAM (Islamic Republic of Iran) said that the Model Provisions were a step towards legal cooperation between Governments and courts. She too would prefer a model law because it would be simple for Governments and parliaments to adopt. It would not involve a long process like a treaty or convention. It also offered more flexibility.

33. She would also prefer to start work with the crucial articles, beginning with article 14. She had some remarks on article 14 which she would make later. She thought it should be redrafted to make it more specific and to the point.

34. Mr. AL-NASSER (Saudi Arabia) agreed with what had been said by the representative of Mexico. The Model Provisions needed to be very thoroughly examined by the relevant authorities, and could be adopted at a future session. In the past, the Commission had devoted a great deal of time at successive sessions to the consideration of such issues.

35. He also believed that discussion should start with article 14 and those following.

36. Mr. GRANDINO RODAS (Brazil) agreed that the text on insolvency—which should take the form of model legislative provisions—should not be adopted hastily at that session.

37. Mr. MOLLER (Finland), addressing the issue of a convention versus a model law, said he saw the advantage of drawing up a convention; however, that was not realistic at the current stage. Even in a regional context, it was difficult to reach agreement on questions of procedure. The approach of model legislation was therefore appropriate.

38. The work should start with the essential articles, beginning with article 14, since they might require lengthy discussion. The issue of concurrent proceedings need not be included in article 14, but it would be wise to have a reference in that article to article 6 on public policy.

39. Mr. GLOSBAND (Observer for the International Bar Association (IBA)) said that the draft represented a genuine effort to reach consensus. There were certain issues that it had not been possible to discuss at the Working Group sessions. One was the issue of concurrent proceedings. As the Secretariat had indicated, a proposal had been submitted on that topic. Concerning article 14, the Italian proposal seemed acceptable, although he thought that the second paragraph proposed by the Italian delegation would be covered in the section on concurrent proceedings.

40. An attempt to have the Model Provisions approved at the present session would be very timely, especially for countries like Japan and the United States which were currently studying their bankruptcy laws with a view to their amendment.

41. Finally, he supported considering the draft as model legislation. His organization had been studying cross-border insolvency for longer than UNCITRAL, and had noted that there had been little success in getting broad multilateral treaties or conventions adopted. Thus the prospects for adopting legislation that would genuinely improve the real world of cross-border insolvency lay in model legislative provisions. Once those had been adopted in some countries, UNCITRAL could turn its attention to a treaty. He would support that, but it should not delay the current process.

42. Mr. Ho Jin LEE (Observer for the Republic of Korea) supported the view that consideration of the Model Legislative Provisions should precede any subsequent deliberations on the need for an international convention. He supported the format of model legislation, given the differences in national legislation addressing problems arising from cross-border insolvency. Later, if there was a need, the model legislation might be recast in the form of an international treaty or convention. As a trading country, his country had great interest in the harmonization and unification of many aspects of international trade law.

43. Mr. SHANG Ming (China) agreed that the format of the instrument should be model legislation. He also shared the concerns of the representatives of Mexico and Brazil. By comparison with a model law, the technical difficulties of a convention were very great. A model law was more flexible, because a convention or treaty had to be accepted as a whole.

44. Some texts such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1980 Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention) had been widely accepted. He felt that if the Commission wanted a treaty format
it should proceed with caution, so as to ensure similar wide acceptance.

45. The present project had his full support. With world developments, transnational or cross-border insolvency had become a common phenomenon. However, in view of the implications for national legislative systems and national legislators, he felt that there was no need to set oneself the target of finishing at that session. Some issues needed careful discussion.

46. Mr. TELL (France) said that his delegation, in the Working Group, had stressed its preference for a convention, even if it was a more ambitious project, over a model law. The model law would not serve the purpose of harmonizing procedures. He understood the position of those who preferred a model law, the main objective being to encourage legislative reform in many States. However, agreements, at least bilateral agreements, would be necessary for the implementation of certain provisions, especially where the principle of reciprocity applied.

47. If, as it appeared, there was a general consensus in favour of a model law, it was desirable that the work should be completed at that session.

48. Mr. CHOUKRI SBAI (Observer for Morocco) said that he would prefer model legislation because, from the point of view of his country's Constitution, the ratification of a treaty or convention was a complicated procedure. There was a real gulf between national laws on cross-border insolvency. Model legislative provisions provided the necessary flexibility, making it possible for national legislators to draw up and promulgate provisions. Despite the difficulties regarding reciprocity, he was in favour of model legislation.

49. On the organization of work, there would be arguments in favour of starting with article 1; however, there might be good reasons for starting with article 14.

50. Mr. NICOLAEVASILE (Observer for Romania) thought that the appropriate form for the text to be adopted was a model law. The objective pursued by the Working Group would be achieved by a model law, which might be transformed into a convention at a later stage.

51. Mr. AL-NASSER (Saudi Arabia), referring to the remarks of the observer for the International Bar Association, said that if the provisions were acceptable in the United States and Japan, the adoption of the model law would be acceptable to many States.

52. The source of problems was a lack of legal provisions to deal with issues relating to insolvency in a clear manner. Such legal provisions as there were were outdated, or concerned with the internal situation only.

53. The CHAIRMAN said he took it that the preference of the Commission was to open deliberations on the substance with article 14.

Organization of work

54. Mr. SEKOLEC (International Trade Law Branch) said he wished to draw attention to the fact that, to allow savings to be made, summary records reflecting the present discussions would be prepared subsequently from tapes. It would be helpful if any written notes covering delegations' statements could be made available to the Secretariat, with an indication of the date, time and subject of the statement concerned.

55. He also wished to remind delegations that, since it was hoped that a final text would be adopted at the session, a drafting group, with all six languages represented, would need to be established to implement the decisions of the Commission. It would meet in the evenings and prepare a finalized text of the Model Provisions for approval by the Commission.

Article 14

56. Mr. SEKOLEC drew attention to the text of article 14 prepared by the Working Group (A/CN.9/435, annex) and said that, during the consideration of the text in the Working Group, one of the questions discussed had been whether public policy should be one of the grounds on which a foreign proceeding might not be recognized. It was proposed that public policy should be covered in article 6, but the question remained open whether a reference should be made to article 6 in article 14.

57. Another question that might need discussion concerned the word "only" in the chapeau of article 14. The word "only" would require all grounds for refusing recognition of foreign proceedings to be listed. If "only" were omitted, there might be some flexibility on the issue.

58. Only subparagraph (a) appeared in the draft as one of the grounds; it was for the Commission to decide what others to include. Suggested grounds were reflected in paragraph 176 of document A/CN.9/435.

The meeting rose at 12.30 p.m.

Summary record of the 608th Meeting

Monday, 12 May 1997, at 2 p.m.

[A/CN.9/SR.608]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 2.10 p.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (continued) (A/CN.9/435)

Article 14 (continued)

1. The CHAIRMAN invited the representative of Italy to introduce his proposals regarding article 14.

2. Mr. MAZZONI (Italy) said that, as mentioned at the previous meeting, he was proposing that article 14 should have two paragraphs. In the first paragraph, the message should be that only in a few limited cases could recognition of the foreign proceedings or of the appointment of the foreign representative be refused. It should be quasi-automatic for the courts of the enacting State to grant recognition except in the case of
He wondered just because it was not brought before the competent court. The 9. Mr. GLOSBAND (Observer for the International Bar Association) supported what the representative of Germany had defined that there was an obligation to recognize a foreign proceeding, it seemed that either the courts of the enacting State should be left free to refuse recognition, as the only way to preserve the supremacy of local proceedings, or the effects should be limited under article 16. His proposal was intended to make it clear that, when a local main proceeding was pending, recognition should not be refused but granted to limited effects, namely for purposes of coordination under the provisions still to be considered on concurrent procedures.

4. He therefore proposed that article 14 should be drafted as follows:

"Grounds for refusing or limiting recognition

(1) Subject to article 6, recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(d);

(b) the application is not made before [a] [the] court having competence pursuant to article 4;

(c) the application does not satisfy the requirements provided for in article 13.

(2) Recognition of a foreign proceeding and of the appointment of the foreign representative shall be granted only to such limited effects as are consistent with the purposes of ensuring coordination of proceedings under article [...]."

5. Mr. SEKOLEC (International Trade Law Branch) said he thought that the point raised in the proposed paragraph (2) would be covered in the proposed provisions on concurrent proceedings to be circulated shortly.

6. Mr. RENGER (Germany) found the proposal of the representative of Italy very useful. The principle should be established that there was an obligation to recognize a foreign proceeding, and he supported the retention of the word "only" in paragraph (1). The proposed list of grounds for refusing recognition seemed satisfactory. On paragraph (2), he shared the concern about the effects of recognition where local procedures were already pending, but thought the issue would be better dealt with in connection with concurrent proceedings, perhaps at a later stage in the discussion.

7. Ms. NIKANIAM (Islamic Republic of Iran) said that the Italian proposal would raise problems in her country's legal system. She doubted whether an application should be refused just because it was not brought before the competent court. The foreign representative should be directed to the right court. If the application were simply rejected, that would cause confusion.

8. The question of limited jurisdiction raised in the Italian proposal was touched on in article 8, and the text proposed in that regard might perhaps be combined with article 8.

9. Mr. GLOSBAND (Observer for the International Bar Association) supported what the representative of Germany had said. The paragraph (1) proposed by the representative of Italy was a useful addition. Paragraph (2) should be considered along with the discussion of concurrent proceedings.

10. Ms. INGRAM (Australia) agreed with the representative of Germany. The provision was very important, and the use of the word "only" provided certainty as to when recognition would occur. Paragraph (2) she supported in spirit, but it should be dealt with under concurrent proceedings, not in connection with refusal of recognition. Recognition was the gateway to cooperation. There was certainly a need to deal with automatic effects of a foreign main proceeding when there was already a local main proceeding, but it was a case of asking the court to coordinate.

11. Mr. TELL (France) said that the Commission must consider whether the issue of public policy as grounds for refusal should be addressed in article 14 or article 6. His delegation considered that it should appear only in article 14, added to the list of exclusions. He agreed that the list should be exhaustive. He had no problems with subparagraph (b) of paragraph (1). Subparagraph (e) could cover non-observance of article 13 and the issue of public policy. He agreed with the representatives of Germany and Austria that the second paragraph should be dealt with along with concurrent proceedings. He wondered whether article 16, paragraph (5), of the Working Group's text, under which automatic recognition would not apply if local proceedings were pending, would not satisfy the concerns of the representative of Italy.

12. The CHAIRMAN thought that the question whether the public policy issue should be dealt with in article 6 would have to be taken up later.

13. Mr. MAZZONI (Italy) said that, in addition to a general reference to article 6, public policy should be mentioned as an express reason for refusal.

14. He still felt that the point raised in his proposed paragraph (2) should be dealt with in article 14 or in article 16. But what was important was that the judge should not be allowed discretion concerning limitation of the effects of recognition when there were main proceedings in the enacting country. It should be clear that it was the law that determined those effects.

15. Mr. WESTBROOK (United States of America) believed the suggestion by the representative of Italy to be very useful, and agreed more or less completely with its spirit. He was not sure that article 14 was the best place to deal with concurrent proceedings, a subject that should be discussed as a whole. It seemed that there was considerable support for the representative of Italy's proposal. In view of that support, he wondered if it would be wise to discuss details of language on the following day, when the Commission would also have the proposals on concurrent proceedings.

16. Mr. MOLLER (Finland) thought that there should be a general provision on public policy. It was really a matter of presentation whether the provision was repeated in article 14 or a reference made to article 6, although it might be better to spell it out in article 14. He agreed with the representative of the United States of America that discussion of paragraph (2) should wait until the Commission had seen the proposals concerning concurrent proceedings.

17. Mr. TELL (France) said that if public policy was included as a ground for refusal in article 14, reference to article 6 should be deleted. In the discussion of article 6, the Commission could consider if public policy should constitute grounds for refusing access by a foreign representative to courts. From his point of view, a public policy exception did not seem necessary or desirable in relation to other articles than article 14. The possibility of refusal on public policy grounds should refer only to recognition.
public policy. Something would be either for or against public policy, and his preference would be to delete the term "manifestly".

53. Mr. COOPER (Observer for the International Association of Insolvency Practitioners) thought that the redraft suggested by the Secretariat was very good, but suggested the addition after "foreign proceeding" of the words "as defined in article 2(a)". In his view, apart from "manifestly", any term which sought to refine the definition of public policy was unnecessary and potentially confusing.

54. Ms. UNEL (Observer for Turkey) thought that an explicit reference to the public policy of the enacting State was necessary. The principle was well established in private international law. The term "manifestly" would be useful in adding emphasis.

55. Mr. AL-NASSER (Saudi Arabia) said that the notion of public policy was not fully clear in the present context. Would it apply, for example, to an application for a visa to enter the country? He agreed with the view that a specific reference to public policy would be out of place in article 14.

56. Ms. INGRAM (Australia) thought that it had been agreed that the reference to public policy was needed, and that it was just matter of presentation whether the general reference should be repeated in article 14. She would prefer to have a stand-alone article on public policy, and no reference in the context of article 14. She recalled that there had been an understanding in the Working Group that a court would not have to consider the public policy issue in an individual case unless a party to the proceeding raised it. She wondered if the new formula would require the court to consider public policy in relation to every application. She could accept a formulation such as "subject to article 6". The text would also be more positive if a wording such as "an application shall be granted if" were used.

57. Mr. ABASCAL (Mexico) said he was against the use of the term "manifestly", which would imply a superficial examination but not exclude the application of internal public policy. The representative of the United States of America had proposed a clarification in the Guide to Enactment, but the Guide would not provide a basis for the interpretation of the article and such a clarification would be insufficient. Moreover, the debate had revealed that some understood the reference as being to international public policy while others understood it as being to internal public policy.

The meeting rose at 5 p.m.

Summary record of the 609th meeting
Tuesday, 13 May 1997, at 9.30 a.m.

[A/CN.9/SR.609]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 9.40 a.m.

CROSS-BORDER INSOLVENCY:
DRAFT MODEL LEGISLATIVE PROVISIONS (continued)
(A/CN.9/435; A/CN.9/XXX/CRP.4)

Article 14 (continued)

1. Mr. MAZZONI (Italy) said that he had five points to make. Firstly, he had no objection to the idea of a positive reference to the duty of the court in the enacting State to recognize a foreign proceeding, unless public policy came into play. He therefore withdrew the proposal he had submitted in writing (see document A/CN.9/XXX/CRP.4).

2. Secondly, he would prefer "may only be refused if" to an expression such as "shall be granted unless".

3. Thirdly, he sympathized with the view of the representative of Mexico that public policy should be interpreted as international public policy; however, in insolvency matters, a common standard for international public policy did not exist, so it would be unrealistic to make such a reference in the model law. Most delegations wanted the public policy reference for the purpose of home use.

4. Fourthly, however, the suggestion for a clause on the international interpretation of the model law deserved support. National judges must be reminded that courts should aim for an objective, uniform interpretation; he referred also in that connection to article 7 of the Vienna Sales Convention.

5. Fifthly, he still considered it important to indicate that recognition had different effects depending on whether or not a proceeding was pending in a court of the enacting State. Consequently, if there were no reference in article 14, there should at least be one in article 16, which described the so-called automatic effects of recognition, making it clear that the automatic effects were limited in the event of a proceeding pending in the court of the enacting State.

6. Mr. OLIVENCIA (Spain) said it was clear from the debate that, despite the efforts of the Working Group, difficulties remained. Insolvency was a very complex subject. He recalled that, in the Working Group, there had been consideration of the need to prepare draft model provisions for international agreements in addition to draft provisions for domestic legislation. There was a risk that "public policy" would be understood exclusively as national public policy. The harmonization of provisions on international insolvency would be better achieved through international conventions. He hoped that the Commission would at some point decide whether to restrict the work to model legislative provisions or to consider an other approach such as model provisions for an international convention.

7. In article 14, he would be in favour of the positive wording suggested at the previous meeting by the Secretariat. However, he felt that the concept of public policy should be expressed exclusively in terms of article 6, with wording at the beginning of the article such as "Subject to ...".
8. The CHAIRMAN thought that there had been consensus at the 607th meeting that the work should be directed, for the time being, towards the preparation of a model law. The Commission could consider later whether the model law might be converted into a convention in due course.

9. On the issue of the reference to public policy in article 14, the majority view was that public policy should be a ground for refusal when an application for recognition of a foreign proceeding was made to a court. If those who felt that no reference was required because the issue was already covered in article 6 could accept a reference such as “subject to article 6”, the question of the inclusion of terms such as “international” and “manifestly” could be postponed until discussion of article 6.

10. The question of concurrent proceedings could be discussed in relation to article 16 and article 22.

11. Mr. OLIVENCIA (Spain) said he wished to make it clear that he was not calling for a choice between a model law and a convention. The Model Provisions could, he hoped, eventually be used as a basis for international agreements on cross-border insolvency.

12. Mr. SEKOLEC (International Trade Law Branch) said that he thought that, even if it was agreed that the wording should be positive, a choice still needed to be made, before the text was referred to the drafting group, between a wording such as “An application for recognition that meets the conditions of articles 2(a), 2(d) and 13 may only be refused if contrary to public policy as specified in article 6” and a wording such as “Subject to article 6, a foreign proceeding shall be recognized if the application meets the requirements of articles 2(a), 2(d) and 13.” The formulation might have implications for the burden of proof and other implications.

13. Ms. SABO (Observer for Canada) said that the first alternative was not positive as she saw it, as compared with the second alternative.

14. Mr. SEKOLEC (International Trade Law Branch) said that, in that case, the formulation beginning “Subject to article 6” could be referred to the drafting group.

15. Mr. CHOUKRI SBAI (Observer for Morocco) suggested that the article should say that an application for recognition should not be refused unless it was contrary to public policy and the procedures established under the laws of the enacting State.

16. The CHAIRMAN said he thought there was general agreement that the phrase “public policy” would not be employed at all in article 14, and that there would be a cross-reference to article 6. The wording of the reference to public policy would be discussed later in relation to article 6.

17. Mr. MÖLLER (Finland) said that he could accept either of the formulations suggested by the Secretariat, albeit with a slight preference for the first. It would be wise to say nothing in the Model Provisions as to whether decisions on public policy should be taken by the court ex officio or would need to be invoked by a party.

18. Mr. TELL (France) said he was interested in the representative of Spain’s suggestions concerning model provisions for a convention. The text might provide inspiration for bilateral agreements, for example. There was a need for an explicit reference to public policy in article 14, because when some States transposed the provisions into domestic law, or bilateral treaties, they might wish not to include article 6, but only article 14. Article 6, which did not relate specifically to recognition, might have no place in a bilateral convention.

19. Mr. AL-NASSER (Saudi Arabia) agreed with the Chairman’s summing up. His concern regarding the public policy issue might be removed depending on the outcome of the discussion of article 16.

20. The CHAIRMAN thought that there was general agreement that article 14 would be drafted on the lines suggested by the Secretariat. The question of concurrent proceedings would be considered again under article 16.

21. With regard to the suggestion of the representative of France that, in view of the likelihood that the model law would be transformed into a treaty, explicit reference should be made to public policy in article 14, his view, after consulting the Secretariat, was that that matter should be considered when a draft for a convention was under discussion. For the time being, the task was to draft a model law. If the model law were to be used as the basis for a treaty, those drafting it could modify article 14 appropriately.

22. Mr. HERRMANN (Secretary of the Commission) said he thought it would be useful, prior to the discussion of article 6, for delegations to consider what public policy should mean. The Commission could make a very useful contribution in that field. Over the past 30-40 years, there had been a large number of court decisions worldwide where public policy had been invoked as a reason for refusing recognition and enforcement, so there was a clear idea of what was meant by the expression. Even if the matter was not directly relevant to insolvency, he was confident that the experts in the Commission could indicate some considerations that they thought justified, because if article 14 was worded as proposed it would be clear that the only real barrier to recognition was public policy, and people would ask what “public policy” was. With the help of delegations, concrete examples could be included in the Guide to Enactment. During the debate, one speaker had argued that “public policy” must in the context mean “international public policy”, but another had said that States would in practice interpret public policy from a national point of view. Examples might serve to give more substance to an otherwise apparently vague term.

Article 15

23. Mr. SEKOLEC (International Trade Law Branch) introduced the Working Group’s text for article 15 (A/CN.9/435, annex). He said that the article dealt with court measures to provide relief that might be granted before a foreign proceeding was recognized, once an application for recognition had been made. The relief that could be granted in the interim period was discretionary, similar to the relief after recognition set out in article 17. The Commission would want to consider the kind of relief that a court might grant in an interim period. The Working Group had decided to establish a parallel between articles 15 and 17, so that basically the court could grant the same kind of relief as after recognition. There had, however, been proposals in the Working Group to restrict relief before recognition.

24. The provisional nature of the relief under article 15 was reflected in paragraph (3), which basically said that provisional relief terminated on recognition, but the court might, for technical reasons, or to make sure that there was no hiatus between relief before and after recognition, extend the provisional relief beyond recognition. A consideration in that context was that the provisional relief might be granted by a court other than the recognizing court, i.e. two courts might be involved.

25. Paragraph (4) dealt with coordination of concurrent proceedings. The paragraph might not be needed there, as the issue could be taken into account with the new article on concurrent proceedings.
26. Another point to mention concerned the expression "the court" in paragraph (1). The text of the Model Provisions was not consistent. In some cases it spoke of the "court referred to in article 4", in others simply of "the court". The Commission should consider, wherever the term "court" appeared, whether it had in mind the special court or groups of courts referred to in article 4, or all courts in the country.

27. Mr. MAZZONI (Italy) believed that there was a fundamental difference in approach between the text proposed in document A/CN.9/435 for article 15, paragraph (1), and the approach that must prevail in countries where courts did not have the power, prior to the opening of a proceeding for recognition, to grant reliefs such as those mentioned in article 17. That was why he was proposing (see document A/CN.9/XXX/CRP.4) an alternative for paragraph (1) based on the idea that, prior to recognition, there could not, in countries such as his, be provisional measures other than those of an individual—as opposed to a collective—nature. The point had been discussed in the Working Group. He had found no reason to modify the position he had expressed in the Working Group and therefore, if a consensus could not be reached on the type of approach indicated in his proposal, his country would have to reserve its position or propose an option should be provided.

28. Mr. ABASCAL (Mexico) said that the Working Group's text for the article was acceptable in principle, but he had reservations concerning the distinction between main and non-main proceedings. Another issue that arose, since article 17 was mentioned, was the possibility for a court, under article 17, paragraph (1)(e), as now drafted, to order a stay of arbitration proceedings. That should not be permissible. However, that point could be discussed when article 17 was taken up.

29. Mr. WIMMER (Germany) said that he understood the concern of the representative of Italy about paragraph (1) and the really far-reaching power of discretion given to the court at that early stage in the proceeding. In his view, however, it might be better to adopt a formula such as: "From the time of filing of an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where necessary to protect the assets of the debtor or the interests of the creditors, grant a relief according to the law of the recognizing State for the period between the application for the opening of the proceeding and the decision to open proceedings."

30. Mr. MAZZONI (Italy) said the problem was that, in his country, no provisional relief of a collective nature could be granted between the application and the decision to proceed.

31. The CHAIRMAN noted that document A/CN.9/XXX/CRP.4, containing the Italian proposal, was not yet available in languages other than English. He requested the guidance of the Commission on how to proceed.

32. After a discussion on procedure in which Mr. GRIFFITH (Australia), Mr. AL-NASSER (Saudi Arabia), Mr. SHANG Min (China), Mr. CHOUKRI SBAI (Observer for Morocco), Ms. MEAR (United Kingdom), Mr. OLIVENCIA (Spain), Mr. ABASCAL (Mexico), Ms. NIKANJAM (Islamic Republic of Iran), Mr. MAZZONI (Italy), Mr. WESTBROOK (United States of America), Mr. OWONE ESSONE (Observer for Gabon) and Mr. TELL (France) took part, the CHAIRMAN said it was his view that discussion of a proposal from the floor, such as the proposal from the representative of Italy, should not be prevented because the written text was not available in all languages. He therefore proposed that the discussion of article 15 should continue.

33. Mr. CALLAGHAN (United Kingdom) supported the policy set out in paragraph (1) of article 15. He saw no need for a cross-reference to article 4. Constant insertion of cross-references brought the danger of duplication. It should be self-evident that each article must be read in the light of other articles.

34. Mr. MÖLLER (Finland) said he was happy with the Working Group's text of article 15. The reference to article 4 could be a matter of substance. If the Commission really meant "a court as defined in article 4" it must say so, as otherwise it would be decided under internal law which court had jurisdiction.

35. Ms. NIKANJAM (Islamic Republic of Iran) was satisfied with article 15 as presented in the Working Group's report. She shared the concern that granting relief only to individual creditors was not sufficient. She could accept the representative of Italy's proposal if a reference to "collective creditors" could be added to the text. She was still concerned about the definition of the competent court, which needed to be clarified.

36. Mr. COOPER (Observer for the International Association of Insolvency Practitioners) regarded article 15 as vital in the scheme of the model law, especially in that it not only made it possible to take urgent action to preserve assets, but also laid the basis for a possible rescue of a financially troubled enterprise. His organization represented insolvency practitioners throughout the world. Although they were aware of sometimes substantial differences in insolvency laws in many countries, few would take exception to the proposed article 15 in the model law. He could understand the concern of the representative of Italy. However, to adopt his proposal would, in the view of his Association, reduce the effective uses of article 15 to such an extent that it would be hardly worth having. It might be necessary for the Guide to Enactment or a footnote to article 15 to point out to countries where the system of law did not permit adoption of the present form of article 15 that they could take a different course, but he urged the Commission not to alter the thrust of article 15 as it now stood.

37. Mr. BERENDS (Observer for the Netherlands) said that there was no relief of a collective nature in his country, so he was in a similar position to the representative of Italy. However, there was a major difference between the opening of an insolvency proceeding and an application for recognition of a foreign proceeding. In the latter case, it was clear that the debtor was already insolvent, and therefore there was a need to take measures quickly. He agreed with the previous speaker's suggestion that the point might be covered in a footnote.

38. Mr. ENIE (Observer for Gabon) said that he supported the principle in article 15 as it stood, as the article was quite flexible and could be interpreted by each State.

39. Mr. MAZZONI (Italy) drew attention to paragraph (2) of his proposal in document A/CN.9/XXX/CRP.4. Paragraphs (1) and (2) of his proposal would replace paragraph (1) in document A/CN.9/435. The reference to the competent court at the end of paragraph (2) of his proposal was capable of causing confusion and he proposed to delete the word "competent".

40. He could not accept the suggestion to amend his text to refer to collective creditors; the very point of his proposal was to make it clear that, prior to recognition, there could only be individual relief. There was no possibility of collective relief in Italian internal law prior to the opening of a local proceeding or recognition of a foreign proceeding.

41. Mr. SANDOVAL (Chile) agreed in general with the text of article 15 as it stood. It would be very important for the
successful recognition of a foreign proceeding. The only change he suggested was that the text should state expressly that the court was the court in article 4.

42. Mr. AL-NASSER (Saudi Arabia) said that he could support the proposal of the representative of Italy. It should be made clear in the Arabic text that, from the time of filing until the application was decided upon, the foreign representative might request relief measures.

43. Mr. WISITSORA-AT (Thailand) said that article 15 seemed quite acceptable, except that he would like to propose the use in paragraph (1) of the expression “the court referred to in article 4”, to assist the foreign representative by providing a clearer destination. He also had reservations concerning paragraph (4), with regard to the distinction between main and non-main proceedings.

44. Mr. OLIVENCIA (Spain) said that he thought it important to specify that the court competent to grant relief was the court competent to grant recognition under article 4.

45. The formula proposed by Italy, providing for individual relief, would be perfectly valid for those countries whose systems did not provide for measures of a collective nature from the time of the application, but he doubted if it could be accepted by countries not in that situation. Moreover, a basic problem of the model law was that, under it, the treatment given to a foreign representative might be more beneficial than in his country of origin, for example in the case of an Italian foreign representative for whom provisional relief would be immediately available. The problem could not be resolved by special formulas for individual legal systems.

46. Another important point concerned the stay of individual proceedings. As pointed out by the representative of Mexico, there would be no justification for ordering a stay of arbitration proceedings, for example. A solution might be to allow the stay of measures of execution but not of proceedings.

47. Mr. TELL (France) said that, for his delegation, the application under article 15 of the measures referred to in subparagraphs (a) to (d) of article 17, paragraph (1), was acceptable, but the measures covered in subparagraph (e) would be excessive and dangerous at the stage of the filing of an application. Nor was it clear how article 17(3) could apply to article 15.

The meeting rose at 12.30 p.m.

Summary record of the 610th meeting

Tuesday, 13 May 1997, at 2 p.m.

[A/CN.9/SR.610]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 2.10 p.m.

CROSS-BORDER INSOLVENCY:
DRAFT MODEL LEGISLATIVE PROVISIONS (continued)
(A/CN.9/435; A/CN.9/XXX/CRP.4)

Article 15 (continued)

1. The CHAIRMAN, summarizing, said that one issue before the Commission was whether to maintain article 15 as contained in document A/CN.9/435, which made all the reliefs available in article 17 available on application for recognition, or to adopt, for example, the proposal of the Italian delegation under which it would not be possible to grant all those reliefs. Other possibilities were: to make all the reliefs contained in article 17(1), subparagraphs (a)-(d), available in the situation envisaged in article 15, but not that in subparagraph (e); to provide that arbitration proceedings could not be stayed; and to provide that proceedings could not be stayed, but only execution. The issue of the competent court also remained to be resolved.

2. Mr. GLOSBAND (Observer for the International Bar Association) thought that the reliefs available under articles 15, 16 and 17 should be granted by the court in article 4.

3. As far as the proposal of the representative of Italy was concerned, his Association favoured the broader availability of provisional reliefs in article 15 as currently drafted. It was hard to see how the position of the representative of Italy might be accommodated without seriously diluting the value of the law. He thought the Commission should proceed on the basis of the text as drafted, on the understanding that the provision might have to be adapted by the enacting State, as in the case of Italy.

4. Mr. WESTBROOK (United States of America) welcomed the degree of consensus on article 15 as drafted by the Working Group. Discretionary provisional reliefs were important in insolvency cases, where even a brief delay might prejudice creditors and others. He agreed with the observer for the International Bar Association that the text should not be changed radically because of a problem affecting one country.

5. Although he was against the designation of the court referred to in article 4 as the competent court, he urged the Commission not to delve too deeply into the question of designating local jurisdiction. There should be a discussion in the Guide to Enactment of the problem of provisional relief. In his country, only one court would probably be involved, but in other countries that might be inappropriate or difficult to achieve. It was a matter for the legislator in each country.

6. Mr. WIMMER (Germany) shared the views of the previous two speakers on the issue raised by the representative of Italy. He also agreed that the designation of the competent court was a matter of local procedural law.

7. The representative of Spain had raised another problem concerning article 15. In his country, there was a distinction between interruption of enforcement measures and interruption of a pending lawsuit. When a proceeding was opened, the court could decide that individual enforcement must be stopped. He suggested, as an option, limiting the scope of article 15(1) in respect of the relief mentioned in article 17(1)(a). That would not prevent those Member States that wished to go further from doing so.
8. Ms. INGRAM (Australia) strongly supported the thrust of article 15, which must refer to the minimum reliefs available under article 17. In cases of urgency, liquidators needed certainty. They must know what reliefs were available to them. Those listed in subparagraph (a) were precisely those measures required to prevent dissipation of assets. However, article 17 relief was only discretionary. Under article 19, the court could tailor the relief, and she felt that article 19 should meet the concerns expressed by some delegations about pending proceedings. The court needed flexibility, but the minimal list should not be abandoned. The aim of the model law was to set an example. Some countries might need to modify their legislation, but did the Commission want a good law or simply the lowest common denominator?

9. She agreed with those who thought that the designation of the competent court was a local matter. Perhaps there should be a note in square brackets asking the enacting State to nominate the competent court in its jurisdiction.

10. Mr. ABASCAL (Mexico) said that the principle reflected in article 15 was in line with Mexican legislation. However, he had problems with the extension to article 15, where what was concerned was a mere application for recognition of a foreign proceeding, of all the possibilities covered in article 17. He supported the view that the provision in article 17, paragraph (1)(a), should not permit interference with pending proceedings as such; only execution should be stayed, in order to avoid dispersion of the debtor's assets.

11. Paragraph (1)(d) of article 17, in the context of a mere application for recognition, might be interpreted as allowing for a kind of "pre-trial discovery" procedure before a decision had been taken on recognition; that might give rise to much opposition in his country.

12. Paragraph (1)(e) of article 17 might open the door to the sale of assets without due legal process.

13. Mr. BLOMSTRAND (Observer for Sweden) said that the provisions were important. The current law in his country did not provide for collective reliefs of a provisional nature, but he shared the view that measures of a collective nature could be accepted in such circumstances. Moreover, the scope of the provisional relief available under article 15(1) was limited to cases where it was necessary to protect the assets of the debtor or the interests of creditors. As had been said, the safeguards in article 19 must also be taken into account. He was happy with article 15 as drafted by the Working Group.

14. He agreed that the competent court was a matter for each enacting State. Finally, he shared the general concerns expressed concerning stay of proceedings. That matter needed to be addressed, though not necessarily in article 15.

15. Ms. MEAR (United Kingdom) said she was very much in favour of keeping article 15 as drafted. She would be opposed to any narrowing of article 15(1). There seemed to be little support for the alternative text proposed. The essence of article 15, as also of article 16, was the availability of fast and flexible relief to deal with emergency situations, and she supported the present structure of articles 15, 16 and 17.

16. On the question of stay of arbitration proceedings, she saw no real distinction, once proceedings had commenced, between arbitration and the resolution of disputes in the courts, other than that arbitration was consensual in origin while judicial proceedings were not. The discretionary nature of article 15 would permit a court to allow court action or arbitration to continue. On the choice of court, she had understood article 4 to apply generally, but agreed with those delegations which felt that the Commission should not delve too deeply. Ultimately, it was a matter for internal procedural rules.

17. Mr. MÖLLER (Finland) generally agreed with article 15. The fact that collective provisional measures did not currently exist in his country was not, for him, a problem. He agreed that the designation of the competent court should be left to each State. He had the same problem as the representative of Germany and others concerning stay of individual actions under article 15, because in Finland even local insolvency proceedings did not mean that individual actions would be stopped. The provision should only apply to execution measures.

18. He was puzzled by the representative of Mexico's interpretation of article 17(1)(d) as allowing for some sort of "pre-trial discovery." He understood the provision as allowing the taking of evidence—naturally in accordance with local law. Regarding the realization of assets under article 17(1)(e), in his country that would be limited to perishable goods. But the conditions of realization would be governed by local law, so he saw no problem.

19. Mr. SEKOLEC (International Trade Law Branch), responding to the suggestion that the Commission should not delve into the question of the jurisdiction of courts, pointed out that, under article 4, it would be for the enacting State to designate the courts competent to perform the various functions involved. The idea of including a reference in article 15(1) to article 4 would be to make it clear that the term "court" in article 15 did not have a broader coverage than the courts mentioned in article 4. If it was intended that article 15 should have a broader scope, that was a matter of substance, but the current text did not answer the question.

20. Mr. BERENDS (Observer for the Netherlands) wondered whether it would be acceptable to the representative of Italy for his position to be accommodated in a footnote. He endorsed the proposal of the representative of Germany that there should be an option to exclude stay of proceedings from article 15.

21. Mr. CHOUKRI SBAI (Observer for Morocco) believed that article 15 was formulated appropriately. In his country, proceedings in matters of insolvency were collective proceedings, and the administrator of the insolvency proceeding alone could commence proceedings. The provisions proposed by the representative of Italy might fit Italian national law, but not that of other countries. He was therefore in favour of maintaining article 15 as drafted, although some details might be considered later in the context of article 17.

22. Mr. MAZZONI (Italy) said that he understood the need for consensus, and would not withhold his consent to the text if at least one of two alternatives could be accepted. From the beginning of the work in the Working Group it had been accepted that, in certain circumstances, a system of options might be used. The present case seemed to be a perfect example. Alternatively, the footnote technique had been suggested. That would seem acceptable, provided that the footnote stated clearly, firstly, that countries that did not have collective measures prior to recognition or the commencement of local proceedings were free to replace the provision in article 15 with reliefs available under local law and, secondly, that even if countries accepted article 15, they were free to reduce the list in article 17.

23. The issue of the competent court was a matter of substance, not just drafting. If any court were permitted prior to recognition of a foreign proceeding to make an order for the stay of proceedings or freezing of assets, that would be a very
radical and totally new power for courts in many States. He wondered if those delegations which had indicated that the proposed new powers for courts caused them no concern had considered the possibility that conflicts might be created among courts in their countries. If article 15 could refer to courts other than the competent court under article 4, that might mean a serious modification of the local procedural system.

24. Mr. ABASCAL (Mexico) said he had found the statement of the representative of Finland very interesting, but wished to point out that, if any meaning was to be given to article 17(1)(d), it granted very broad powers concerning information that the debtor had to provide, since it spoke of the supply of information concerning the debtor’s assets, affairs, rights, obligations or liabilities. It seemed to him a very good idea that the right to sell goods should be limited to perishable goods, understood to include those liable to lose their value rapidly, such as fashion garments.

25. Mr. MÖLLER (Finland) said, concerning 17(1)(d), that he thought it would not allow “pre-trial discovery” in the sense of “fishing expeditions” where the documents to be delivered were not specified. In any case, his understanding was that the taking of evidence would always be in accordance with local law.

26. Mr. AGARWAL (India) said that there was a slight conflict between articles 4 and 15 on the question of the court. Article 4 required specification of a court, while articles 15 and 17 could refer to any court. The matter should be left to domestic legislation. A debtor might be in one city, and the court or authority specified under article 4 in another, distant place. It might be difficult for the foreign representative and the debtor to attend the proceedings.

27. Mr. TELL (France) thought that the administration and realization of a debtor’s assets should be possible only after a decision had been taken to recognize a foreign proceeding. His proposal was that article 15 should refer only to subparagraphs (a)-(d) of article 17(1). The objective of article 15 was to protect the assets and interests of the debtor and the creditors, and that could be fully achieved by the reliefs in article 17(1)(a)-(d). If there was no consensus on restriction of the reliefs in article 15 to those in article 17(1)(a)-(d), article 15 should at least be amended to require the court hearing an application for recognition to take into account the restrictions set out in article 17(3) before authorizing measures such as seizure or realization of assets. For the same reasons, he shared the concerns expressed by others related to stay of proceedings. A wording could perhaps be found that would provide for the possibility of limiting the stay to execution.

28. Mr. WESTBROOK (United States of America) said that it was quite true that, early in the discussions of the model law, in Vienna two years earlier, the “menu” or option approach had been discussed. Since then the Commission had been much more successful in finding common ground than had been anticipated at the outset. It had been realized that including particular options would lead to difficulties in the adoption of the model law by making it too complex. A consensus had emerged in the Working Group that options should not be included unless there was broad, though not majority, support for a position or a widespread need for a provision to allow the adoption of the model law. It had always been agreed that it might be necessary in some countries to adjust the text to meet procedural or particular difficulties. That was not the same as including an option or menu in the model law. When there were two options, the suggestion would be that either option was equally good, and that would encourage non-uniformity. In that light, he had not seen sufficient support for the representative of Italy’s proposal to justify the inclusion of an option. Nor was he sure that an option or footnote was needed to cover the question of stay of proceedings.

29. His delegation did not contemplate any sort of “pre-trial discovery” under article 17(1)(d), which only listed areas of information that might be included in an examination under local procedures.

30. Mr. CALLAGHAN (United Kingdom) said that, in considering article 17 in the light of article 15, it should perhaps not be forgotten that the purpose was to freeze the position for the foreign representative when he applied for recognition. To do that, the reliefs provided for under subparagraphs (b) and (d) of article 17(1) would definitely be needed, and that provided for under subparagraph (e) might be needed if the debtor had perishable assets. If that possibility was not available, what could be done, for example, in the case of foodstuffs? In any case, all reliefs were at the discretion of the court.

31. Ms. NIKANJAM (Islamic Republic of Iran) agreed with the representative of the United States of America that article 15 should remain as drafted. It covered all the needs for provisional relief. She felt that article 17 placed too much power in the hands of the foreign representative, but as long as the courts had discretion she would not oppose it. The competent court was a matter for the enacting State and there was no need for further specification in the text.

32. Mr. COOPER (Observer for the International Association of Insolvency Practitioners) said that he understood the concern of the representative of France regarding the application of article 17(1)(e) to provisional relief. But there might be circumstances where perishable goods, for example, should be immediately sold. There was also the case of an enterprise insolvent in one country, with an operation in another country. The management in the latter country might have walked out because of what had occurred in the home office. Something needed to be done to protect the interests of creditors, and that was only possible if an administrator was appointed—the foreign representative or a person designated by the court. The court could keep control by appointing a local person. In his experience, even in countries considered more adventurous in providing such types of interim relief, such as Australia and the United Kingdom, judges would look very carefully at an application to dispose of property at a very early stage, and not simply rubber-stamp an order to that effect. He would not like to see a fragmentation of article 15 because of hesitation over the inclusion of one or more of the article 17 reliefs. In his view, it was safe enough to include all those reliefs.

33. Mr. GLOSAND (Observer for the International Bar Association) shared the views of the representatives of the United States of America and the Islamic Republic of Iran. He emphasized that article 15 was designed to deal with emergencies. Typical emergencies at the beginning of insolvency proceedings did require immediate protection of assets and access to information. To deprive the foreign representative of the possibility of obtaining protection at the start might deprive him of all relief. In the context of emergency relief, in all jurisdictions he was familiar with, courts took very seriously any imposition on other parties, and weighed carefully the information about the emergency and the need for protection.

34. Regarding the administration of assets, as had been pointed out, concern about uncontrolled power granted to a foreign representative was met by the fact that the administration could be entrusted to some other person designated by the court.
35. Mr. GRIFFITH (Australia) stressed that the Working Group’s view had been that it would be appropriate for the model law to provide a better regime than that prevailing under the present domestic law of particular States. The Commission should accept that its role was to make the world a better place. The purpose of drafting the model law was to enhance domestic law in States in respect of cross-border insolvency, and the view of the Working Group had been that the Commission should produce a model law, not a menu of options.

36. It seemed to him that particular weight should be given to the views of the professionals from INSOL and IBA, particularly bearing in mind that the current exercise had arisen out of an initiative by INSOL. Another point to be stressed was that the aim of article 15 was to provide an exceptional remedy to protect the assets of a debtor and thus the interests of the creditors, for example in the case of perishable foodstuffs. As had rightly been pointed out, the proposed powers would, in any case, lie in the hands of local courts. Some civil law jurisdictions, if the model law vested such powers, might be more conservative in exercising those powers than was the case in countries where there was an innovative use of such powers. But it was appropriate that powers necessary to protect assets should be brought into existence, and there seemed to be very strong practical reasons why powers of the sort listed in article 17(1) should be available, as an exceptional matter, under article 15. That being so, he submitted that the existing text should be supported unless there was a clear and substantial body of opinion that such provisions would not work by reason of some principled inhibition in a substantial number of States, and he strongly urged that the provisions should remain as a single text, without options or footnotes.

37. Ms. UNEL (Observer for Turkey) said that she shared the concerns expressed by the representatives of Italy and France. Foreign creditors should not be preferred vis-à-vis local creditors. Equality of treatment was a very important principle.

38. Mr. MÖLLER (Finland) agreed with the representatives of the United States of America and Australia that the options approach should be avoided. Regarding the stay of individual actions under article 15, he wondered whether it would not be enough to stay execution, allowing proceedings to continue. Even though an application to stay proceedings would not be automatically granted, if the provision existed there would presumably be situations where the court would order a stay. It was most important for his delegation that the model law should be acceptable to the legislator in Finland.

39. Mr. OLIVENCIA (Spain) said he did not think that it was appropriate to make a “block” reference in article 15(1) to article 17, because articles 15 and 17 related to different situations. Unlike article 17, article 15 should be limited to provisional, urgent measures.

40. Stay of proceedings under both article 15 and article 17 should be limited to stay of execution. It should be possible for proceedings to be initiated and continued to the point of decision, but not executed. That should be clearly stated.

41. Where interpretations differed, as with regard to article 17(1)(d), which according to the representative of Mexico would cover “pre-trial discovery” but according to others would not, the intention should be expressed clearly in the model law. As applied under article 15, the provision should cover only urgent measures. The delivery of information was not urgent. It would be enough to ensure the security of documentation, so that documents could not be removed, concealed or destroyed. The foreign representative or another person should be entrusted with their safekeeping.

42. The same consideration applied to article 17(1)(e), which had been interpreted in various ways. It should be made clear that it referred to perishable goods, or goods that might lose their value. It was not a matter of liquidation, but of conversion into money of assets consisting of perishable goods so as to preserve their value. The purpose of the relief in article 15 was conservation.

43. Mr. WESTBROOK (United States of America) explained that the reason for providing for stay of proceedings was that, in many cases, the debtor, without money to pay lawyers, was unable to defend some actions, and judgement could be given against him by default, something that could be difficult for the liquidator to reverse following the bankruptcy of the debtor. That was a serious issue in the context of articles 16 and 17. In the case of article 15, however, he took note of the concerns expressed by the representative of Finland and others, although he still had difficulties, agreed in the context of provisional remedies that there was less likelihood of serious prejudice in the short period between application for and granting of recognition. Some limitation, as suggested by the representative of Germany, would not be too serious. Perhaps a text could be worked out in informal consultations.

44. The CHAIRMAN suggested that the representatives of France, Finland and Germany should assist the representative of the United States of America in drafting an appropriate text for consideration by the Commission.

45. Summarizing, he said he thought that there was a general consensus that article 15 should remain as drafted, subject to a decision on the point last mentioned. The view that the relief under article 17(1)(e) should be confined to assets of a certain type did not seem to be widely supported. The position of the Italian delegation had also received little support. That delegation’s view would be covered in the report of the proceedings but there should not be an option inserted in the text, because the guiding principle was that the menu approach should only be adopted when there was a substantial minority opinion. The prevailing view on the reference to the court was that it should be left to the enacting State to specify which court should handle the matter, although there would be an opportunity to take that subject up again during the consideration of article 4.

46. Mr. ABASCAL (Mexico) said that, in article 17(1)(d), it should be made clear that the measures provided for must take place in accordance with local procedural rules. In informal consultations, the representative of the United States of America had expressed his agreement with that and, as the representative of Spain had said, where there was any doubt it was desirable that the text should clarify the matter.

47. It would be no solution to provide an explanation in the Guide to Enactment, since that document would not constitute a commentary or have the force of law. The point must be dealt with in the text of the Model Provisions.

48. Mr. MAZZONI (Italy) said that his delegation would not approve article 15 in its present form unless at least a footnote indicated that, for those States that did not have collective reliefs prior to recognition, the way was open to limit relief to provisional reliefs available to individual creditors. If that was not acceptable, he wished to place on record the opposition of his delegation to article 15.

49. The CHAIRMAN said he would like to hear the views of members on his ruling that the proposal of the representative of Italy had not received sufficient support and should therefore be covered only in the report, and on the representative of Italy’s view that there should be at least a footnote to article 15.
50. Ms. SABO (Observer for Canada) was satisfied with article 15 as currently drafted. With articles 13, 14, 17 and 19, it represented a successful effort to meet the concern, at the forefront of many of the discussions in the Working Group, to ensure that appropriate relief was speedily available without allowing the foreign representative to obtain inappropriate or unfair relief. However, subject to seeing draft texts, she could accept the compromise solutions with respect to subparagraphs (a) and (d) of article 17(1) along the lines proposed.

51. Concerning the representative of Italy's proposal, it had been her delegation's view all along that, where possible, a menu of options should be avoided. Where delegations could achieve a compromise, they should seek to do that rather than simply providing widely differing alternatives. In the case of a variant which would seem to be tailored to only one or just a few jurisdictions, providing for an option or a footnote would be a dangerous disincentive to States which, it was hoped, would enact the Model Provisions, and encourage them to take the easiest course rather than move towards greater uniformity.

52. Mr. BERENDS (Observer for the Netherlands) said that he did not like options, but it was better to have consensus on a text with options than no consensus without options, or consensus on a text with hidden options. He did not agree on the substance with the Italian delegation, but would not be against reflecting that delegation's view in a footnote. He welcomed the proposal from the representative of the United States of America concerning the reference to article 17(1)(a).

53. Mr. GRIFFITH (Australia) said he understood the representative of Italy's position, but the fact that that view had been strongly reiterated was not enough to justify an exception. It was not the practice of UNCITRAL to state individual reservations in its report, which indicated the general thrust of views but not the stands of individual States. UNCITRAL always operated by consensus, which meant not unanimity but a readiness to go along with views that were not one's own. In the case of international arbitration, for example, common law and civil law lawyers had moved closer together and common law lawyers had been able to enact a text which was working effectively. There should therefore be no footnote.

54. Mr. ENIE (Observer for Gabon) said that a footnote to article 15 would set a precedent for footnotes to other articles. Should not the present text, which was flexible, be left as it stood? Alternatively, other proposals could be considered too.

55. The CHAIRMAN said there was consensus that the reference in article 15 to article 17(1)(a) would be redrafted in informal consultations. He sought guidance on the suggestion that the position of the representative of Italy should be included as an option or in a footnote.

56. Mr. ABASCAL (Mexico) said that footnotes were not a good idea, but that if the representative of Italy had objections of substance they would have to be taken into account; the Italian proposal would probably have to be mentioned in a footnote.

57. Mr. BURMAN (United States of America) said he was most concerned at the suggestion that, even though a substantial majority was in favour of one direction, a small body of dissenting opinion should be granted a footnote. It was crucial to the Commission to work on a basis different from that of "consensus" in the sense of everyone having to be included: the tradition was that a substantial majority was recorded as the "prevailing view", and that all delegations had to live with it. It was not appropriate for any country with a particular problem to expect the Commission to accommodate that problem; otherwise, nothing useful could be accomplished by the Commission. All must be willing to accept the prevailing view when there was a strong enough majority.

58. Mr. MAZZONI (Italy) said that he fully respected the views of other delegations on the traditional methods of working, but there were cases where a country requested its opposition to be placed on record. He simply could not give Italy's approval to the proposed provision. He reiterated that, if a footnote was not possible, he would oppose article 15.

The meeting rose at 5 p.m.

Summary record of the 611th meeting

Wednesday, 14 May 1997, at 9.30 a.m.

[A/CN.9/SR.611]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 9.35 a.m.

CROSS-BORDER INSOLVENCY:
DRAFT MODEL LEGISLATIVE PROVISIONS (continued)
(A/CN.9/435)

Article 15 (continued)

1. The CHAIRMAN, summarizing, said that one of the proposals considered at the previous meeting had been to exclude all reference to article 17 in article 15. That proposal had not received sufficient support.

2. As to whether all the reliefs available under article 17 should also be available under article 15, there had been general agreement on the need to amend article 17(1)(a), and consultations among some delegations had resulted in a compromise text. He invited the representative of the Secretariat to read out the proposed text.

3. Mr. SEKOLEC (International Trade Law Branch) said that the proposal was to replace the words "grant any relief mentioned in article 17" at the end of article 15(1) by the following: "stay the execution of claims concerning the debtor's assets, rights, obligations and liabilities and grant any relief mentioned in article 17(1), subparagraphs (b)(f)".

4. The CHAIRMAN said that there had been insufficient support for a proposal to delete subparagraph (e) of article 17(1). The provision of information, covered in article 17(1)(d), had also been an issue; however, it was his understanding that the
provisions concerning information would be applied in accordance with local law and that there was no need to modify the text. The proposal that the realization of assets under article 17(1)(e) should be confined to perishable goods or those whose value changed rapidly had received insufficient support.

5. Mr. TELL (France), referring to the issue raised by his delegation concerning article 17(1)(e), said that some speakers had indicated that it was a matter of protecting assets such as perishable goods. However, the provisions of article 17(1)(e) were of a very general nature. If the objective was to provide for urgent measures to preserve assets in specific cases, he still did not understand the initial proposal for a "block" reference to article 17 in article 15. It would be preferable to provide for specific measures in article 15. It was now proposed to refer only to subparagraphs (b)-(f) of article 17(1) in article 15. He had been under the impression at the previous meeting that it would be possible to find a formula meeting all concerns by providing for the realization of endangered assets while satisfying those who wanted to avoid a provision of a general nature, with the risks that would arise in some States for the interests of local creditors. It was essential to preserve a balance between the interests of local and foreign creditors. It should be remembered that the text was intended for the international community as a whole, and not just for certain legal systems. It must satisfy all legislators. His delegation would have difficulties if there were too many provisions not compatible with some legal systems.

6. Mr. WIMMER (Germany) welcomed the proposed amendment to article 15(1) Concerning the reference in article 15(1) to article 17(1)(e), he would prefer the provision not to be limited to perishable goods. It was not possible to predict all cases when the administrator should be authorized to realize assets before the recognition of a proceeding.

7. Mr. OLIVENCIA (Spain) said that he could not take a position on the proposed amendment to article 15(1) because its purport was not clear to him. He fully shared the concerns expressed by the representative of France. At the stage in the proceedings covered by article 15, it was not known whether or not recognition would be granted. The same approach could not apply as in article 17, since the criterion in article 15 must be that of urgency. The measures needed to be graduated, and the new proposal did not achieve that. Moreover, a "block" reference would have an illogical consequence, since article 17(1)(e) referred back to article 15 and a reference to it in article 15 made no sense. With regard to article 17(1)(d), it was not enough to say that "discovery" was not meant and that domestic law would apply; a reference should rather be made to the urgent preservation of books, files and other documents. Similarly, the provision in article 17(1)(e) should apply only in relation to urgent measures to conserve perishable assets of assets susceptible of devaluation; there could not be a general authorization to liquidate all goods in the territory of a State before the outcome of the relevant proceedings was known.

8. Mr. CHOUKRI SBAI (Observer for Morocco) said that, as he understood it, article 15 concerned temporary relief covering the period from the application for recognition to the decision on recognition. The text of article 15 should be flexible, allowing the court to strike a balance between local law and international law, and general principles of justice. In his country, the courts would try to protect debtors' assets in order to protect the interests of local or foreign creditors. All reference to article 17 should be deleted from article 15(1).

9. Mr. AGARWAL (India) said that the amendment to article 15(1) that had been proposed would not materially alter the position. Rather than referring to article 17, the text might leave it to the court to provide appropriate relief as necessary to protect assets of debtors. Regarding article 17(1)(e), the main concern related to a situation where there were goods of a perishable nature and urgent action was needed. Provision could be made for the court to have the power to arrange for the sale of such goods and keep the sales proceeds until claims were decided.

10. Mr. MAZZONI (Italy) supported the position of the representatives of France and Spain that relief available prior to the decision on the application for recognition should not be the same as relief available following recognition. There should be an emphasis placed on the specific reasons for granting prior relief.

11. Mr. MöLLER (Finland) said that his concerns were covered by the new proposal read out by the representative of the Secretariat. The logical point raised by the representative of Spain regarding the "block" reference was a drafting matter; there could not be any real misunderstanding. He could agree to the reference to article 17(1), subparagraphs (b)-(f).

12. As to article 17(1)(e), even if the text did not refer explicitly to perishable goods or goods that would lose value, in many jurisdictions it would be possible only for such goods to be sold. Saying that the court "may" grant the reliefs referred to made it optional. The court's action would also be subject to further conditions under internal law.

13. Mr. COOPER (Observer for the International Association of Insolvency Practitioners) said that the proposed amendment to article 15 was entirely acceptable. Commenting on the statements of the representatives of France and Spain, he said that there would be a grave danger in trying to particularize those instances in which it was necessary in the creditors' interests to realize assets. However long the list, there was always the danger in the real world of unforeseen circumstances not included in the list, in which case relief would not be available. The representative of Spain would like a gradation in the measures provided for, but that would not work in practice because it was not possible to predict what might occur.

14. An attempt had been made to distinguish between liquidation and preservation. The fact was that liquidation often led to preservation of employment and markets. For example, a branch of an enterprise in another country employing people and providing a market-place for goods or services might have to be sold quickly so that it could continue as a going concern; that was liquidation in one sense, but preservation in a wider sense. One could not, therefore, view article 15 in terms of an ideological distinction between preservation and liquidation.

15. Others had suggested that the problem could be solved by making article 15 a very wide discretionary article. In view of the progress made in marrying article 15 with article 17, he thought it would be going backwards to return to generality.

16. Ms. NIKANJAM (Islamic Republic of Iran) said that she thought the reason for a "menu" approach in article 15, making reference to article 17, was to give courts an idea of the types of provisional relief that they could grant to foreign representatives. If such an approach was not desired, she did not see why a formula such as the proposed text read out earlier by the Secretariat was necessary: the text could be very general, as suggested by the representative of India, and provide, for example, that at the time of the application for recognition the court might grant any available provisional reliefs for the protection of the assets of the debtor and the interests of creditors.

17. Mr. GRIFFITH (Australia) said that a major objective was to provide certainty for administration. As it was not possible to
foresaw all circumstances, flexibility was needed, i.e. a "menu" like that in article 17(1)(b) to (f) which would be available in emergency situations. Regarding the preservation of assets, it was not just a matter of perishable foodstuffs: any asset might in practice be "perishable" in the sense of being immediately in jeopardy. Especially in an era of electronic funds transfer, assets could be transferred rapidly overseas. Powers of the kind referred to in article 17(1)(d) and (e) might be needed to avoid situations where assets of failing companies were lost because of a legal incapacity to trace or recover such assets.

18. Mr. SANDOVAL (Chile) shared the concerns expressed by the representatives of France, Spain and Morocco and could not accept a "block" reference to article 17. Nor did he support the proposed amendment read out at the beginning of the meeting, referring to certain subparagraphs. Article 15 had the specific purpose of allowing for urgent provisional measures to protect the assets of debtors and certain documents, and should be limited to that. The conception of bankruptcy and insolvency proceedings as a mechanism for reassigning assets in the market was not accepted in most insolvency legislation under the Roman law system. To liquidate was not to continue, and he could not accept the view that liquidation might be preferable to preservation. He thus supported those who argued that article 15 should have its own text, without any reference to article 17.

19. The CHAIRMAN thought that there was general agreement that article 15 differed from article 17. The main difference seemed to be that the relief under article 15 was provisional. He asked those delegations that wished to make a clear distinction between the articles to propose specific wording.

20. Mr. TER (Singapore) said he could accept the compromise proposal for article 15(1). In his country's legal system, the law gave courts considerable freedom to use judgement in making orders. However, he was puzzled by the inclusion of subparagraph (c) of article 17(1) in the reference.

21. Mr. DOYLE (Observer for Ireland) supported the amendment read out by the representative of the Secretariat.

22. Mr. GLOSBAND (Observer for the International Bar Association) said that he agreed with the observer for INSOL on the practical issues he had discussed. With regard to the point that relief under article 15 was available only in emergency situations to deal with urgent matters, he had thought that that was implicit in article 15 and in the very concept of provisional relief. If it would be helpful, the model law could specifically say, for example, that relief could be granted where necessary "on an emergency basis". It should not, however, limit the options available to deal with emergencies, not all of which were foreseeable.

23. The CHAIRMAN asked whether the addition in article 15(1) of wording to the effect that the relief available would be for emergency purposes would address the concerns of delegations wanting a clear distinction between the relief in article 15 and the reliefs in article 17.

24. Mr. WISITSORATAT (Thailand) said he would support such an addition. He agreed that the options in articles 15 and 17 should be the same, as both were meant to help creditors to track down debtors around the world. He saw no harm in leaving the measures to be decided by the local court.

25. Mr. WIMMER (Germany) said he thought, with respect to the concerns of some delegations regarding a "block" reference to article 17 in article 15, that the judge would be aware that he was acting in a provisional framework and that any decision he took would be provisional. It seemed self-evident that he was not allowed to anticipate the final decision. However, if it helped, he could support an addition stressing the provisional nature of the relief.

26. Ms. LOIZIDOU (Observer for Cyprus) said that her delegation was happier with the version of article 15(1) read out by the representative of the Secretariat. However, Cyprus would still have difficulty in adopting a model law including in article 15 a reference to article 17(1)(e) as it stood. The right of the court to entrust the administration and realization of assets to the foreign representative or any other person should be restricted to exceptional cases, such as when the goods were perishable, a term that would be defined in the model law.

27. Mr. DOMANICZKY LANIK (Observer for Paraguay) said that it would be useful to amend article 15 to make it clear that the relief referred to was urgent relief.

28. Mr. BLOMSTRAND (Observer for Sweden) welcomed the proposed amendment read out by the representative of the Secretariat to article 15(1). It removed his delegation's difficulties regarding stay of proceedings and stay of execution. He could accept article 15 with that change, and understood that there needed to be flexibility as to reliefs that could be granted. If it would help other delegations, he could accept a mention in article 15 of "emergency cases" or "urgency", for example.

29. Ms. UNEL (Observer for Turkey) said that article 15 should be more general. It was not appropriate to make a "block" reference to article 17. In her view, the article should leave it to the judge to take the necessary measures under national law.

30. Mr. ABASCAL (Mexico) said that the reasons for authorizing the sale of assets or the administration of assets might be very good, but it must not be forgotten that the situation under discussion was one where there was only an application for recognition of proceedings, without any decision having yet been taken, and it would be difficult to go beyond measures for the preservation of assets, which should include the sale of perishable goods or those susceptible of devaluation. Disposal of assets or the taking over of administration had definitive consequences. Mexican law permitted the judge to take necessary measures to preserve assets, and the Moroccan proposal would therefore be acceptable. But authorizing the sale of assets and the administration of assets might prevent Mexico from adopting article 15.

31. Mr. WESTBROOK (United States of America) supported the amendment read out by the representative of the Secretariat. Listening to the discussion, he was struck by the fact that two very different viewpoints were emerging. Some wished to delete any reference in article 15 to article 17. Others wanted more specificity or limitation with respect to provisional relief. There were merits in both approaches, and he recalled that, in the discussions during the Working Group sessions, his delegation had initially favoured a general, unrestricted provision in article 15. However, some delegations had wanted more specific provisions and, despite the legitimate concerns of the practitioners represented by INSOL and IBA, it had been agreed to make a reference to article 17 as a compromise, providing a degree of specificity but retaining some generality.

32. The suggestion of the representative of IBA to include a reference to urgency, or an emergency, was a very good idea. As had been said, the difference between articles 15 and 17 was a difference not of scope but of urgency. Relief under article 15 would be unlikely to be granted except for very urgent reasons in unusual situations. He could accept any language on those
Mr. ABASCAL (Mexico) said that the German suggestion was not a question of drafting. It should be stated in the text that the measures would be provisional.

Mr. SEKOLEC (International Trade Law Branch) suggested that, subject to review by the drafting group, a solution might be to replace the words "where necessary" in paragraph (1) of article 15 by the words "where relief is urgently necessary".

Mr. WIMMER (Germany) suggested that the expression "relief of a provisional nature", or similar language indicating the scope of the relief in addition to its urgency, should be used.

Mr. ABASCAL (Mexico) said that the German suggestion was not a question of drafting. It should be stated in the text that the measures would be provisional.

The CHAIRMAN said there seemed to be agreement that article 15(1) should be amended to indicate that the relief would be granted on grounds of urgency and be provisional in nature. However, there was still a strong feeling that a distinction should be made between relief of a definitive nature and temporary relief, particularly in relation to the relief provided for in article 17(1)(e). Perhaps the representative of France could suggest appropriate wording.

Mr. TELL (France) proposed that article 15(1) should be amended to state that the court might, if urgency (or the survival of the business) so required, stay the execution of claims and grant any relief mentioned in article 17(1), subparagraphs (b), (c), (d) and (f), to protect the assets of the debtor or the interests of the creditors, and that the court might also, under the same conditions, grant the relief provided for in article 17(1), subparagraph (e), to preserve assets which, by their nature or because of circumstances, were perishable, might lose their value or might be removed from the control of the foreign representative. It would also be stated that the relief would be provisional in nature, in line with the suggestion of the representative of Germany.

Ms. SABO (Observer for Canada) said that she agreed with the suggestion read out at the beginning of the meeting concerning stay of proceedings. She felt that the provisional nature of the relief available was already clear from paragraph (3) of article 15, but she had no objection to the point being specifically emphasized. The language suggested by the representative of France in relation to subparagraph 17(1)(e) seemed to reflect the ideas expressed, but she wondered if it was sufficient to talk about preserving assets, rather than preserving the value of the assets, since there might be instances where selling the assets would be the only way to achieve that.

She also recalled the comments made by other speakers concerning article 17(1)(e); there seemed no need to refer to that subparagraph.

Ms. MEAR (United Kingdom) said that, in the light of the discussions, she could agree that, in article 15, the relief available under certain paragraphs of article 17 should be modified in the light of the purpose of article 15. She also agreed on the need to protect the value of assets. With that understanding, an amendment along the lines of the French proposal was acceptable.

Mr. GRIFFITH (Australia) supported the suggestion that the text should refer to preservation of the value of assets. However, the reference in the representative of France's proposal to assets which might be removed from the control of the foreign representative would not meet the concern that had been expressed by his delegation. Perhaps the text could end with the reference to protecting or preserving the assets or their value.

Mr. COOPER (Observer for the International Association of Insolvency Practitioners) said that it was not just a matter of the disposal of assets; the administration of debtors' assets or affairs must also be covered. He recalled in that connection the example he had mentioned at the previous meeting of an enterprise in one country with a branch in another.

The proposal would also include administration.

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51. Mr. OLIVENCIA (Spain) welcomed the amendments proposed, and especially the express reference to the provisional and urgent nature of the relief. The amendment reducing the relief available under article 17(1)(a) to stay of execution, which he understood to refer to execution against assets, was also satisfactory. With regard to the reference to subparagraph (b) of article 16(1)(b), he noted that the mention there of article 16(1)(b) would make no sense in relation to article 15. Subparagraph (c) should not be included at that point. Regarding subparagraph (d), what was urgent was to protect books and documents of the debtor from the risk of destruction or disappearance. On subparagraph (e), he supported the proposal of the representative of France, on the understanding that it included administration, and subject to the inclusion of a reference to preservation of value.

52. Mr. ABASCAL (Mexico) said that powers of administration should not be granted. As an example, in an arbitration proceeding in which he was participating regarding a dispute in a joint venture, the minority partners were asking for the administration of the company to be placed in the hands of a third party. That would be to ignore Mexican company law. Too many interests could be affected in the management of a company, and the established rules on company management must be observed as long as there was no definitive recognition of the insolvency.

53. The CHAIRMAN asked whether any other delegations supported the position of the representative of Mexico that administration should not be covered under article 15.

54. Mr. MAZZONI (Italy) said that the representative of France's proposal seemed a good one and could remove his delegation's objections to article 15. However, he thought that wording should be added to the effect that the relief would be granted "subject to the limitations applicable to provisional measures". The reference would be to the limitations applicable in each enacting country on the scope of provisional measures. It was not a question of the circumstances in which the relief would be granted; a distinction must be made between the grounds for granting relief and the nature of the remedy, taking into account the rules applicable to "provisional relief", in the sense of "conservation measures" ("mesures conservatoires").

55. He shared the concerns of the representative of Mexico on the inclusion of powers of administration and of liquidation but, with the addition he had just proposed, the text was perhaps acceptable.

56. Ms. NIKANJAM (Islamic Republic of Iran) was satisfied with the present wording of article 17(1)(e). For her country, a more general text would be preferable to one going into details, for example by referring to "perishable goods". Relief was in any case provisional, and administration would be under the supervision of the court, so there was no need to be more specific.

57. Mr. GRANDINO RODAS (Brazil) said that he supported the representative of France's proposal as originally made.

The meeting rose at 12.30 p.m.

Summary record of the 612th meeting

Wednesday, 14 May 1997, at 2 p.m.

A/CN.9/612

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 2.05 p.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL
LEGISLATIVE PROVISIONS (continued) (A/CN.9/435)

Article 15 (continued)

1. The CHAIRMAN said that a text had been drafted to take into account the debates so far. He would ask the representative of the Secretariat to read out that text.

2. Mr. SEKOLEC (International Trade Law Branch) said it was suggested that article 15(1) should read:

"(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:
(a) staying the execution of claims against the debtor's assets;
(b) any relief mentioned in article 17(1), subparagraphs (b), (d) and (f);
(c) entrusting the administration and realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, to protect and preserve the value of the assets [that, by their nature or because of other circumstances, are perishable or susceptible to devaluation]."

3. Mr. CALLAGHAN (United Kingdom) said that his delegation was largely happy with the suggested wording. The text in square brackets should probably be included. He would urge delegations that might still have doubts to bear in mind that the whole model law had to be read as one, and to take into account article 19.

4. In connection with the view expressed by the representative of Spain at the previous meeting that what was important under article 17(1)(d) was to preserve books, he would like to point out that books might be missing or have been destroyed, or might lack vital information, in which case it would be essential and urgent to be able to interview key staff to find out about the assets and what had happened to them.

5. He could not support the view expressed by the representative of Mexico; there could be a need for strong provisional relief from the time of the application.

6. Mr. GLOSBAND (Observer for the International Bar Association) said that, in a spirit of compromise, he could accept
the changes suggested by the representative of France. The question of protecting assets from removal was not dealt with in the text just read out, but was already covered in article 17(1)(b). He agreed with the representative of the United Kingdom that there should not be any further restriction of the provisions for obtaining information under 17(1)(d). Finally, he could not support the addition suggested by the representative of Italy at the previous meeting to qualify relief as within the limits of local provisional relief, that would in effect be going back to the original Italian proposal.

7. The CHAIRMAN said that there had not been widespread support for changing the content of article 17(1)(d).

8. Mr OLIIVERCIA (Spain) commended all those who had collaborated in producing the compromise formula; it satisfied a substantial part of the concerns he had expressed, and he could accept it. In subparagraph (c) of the new draft for article 15(1) read by the Secretariat, he would prefer “administration and realization” to be replaced by “administration or realization”. Regarding article 17(1)(d), he would not insist on his view, but for him the point was the conservation of evidence rather than the hearing of witnesses. Conservation could include measures to guarantee the presence of the debtor or of an important witness, as well as conservation of books and other material.

9. Mr MOLLER (Finland) was totally happy with the compromise proposal. He would prefer that the text in square brackets should be retained for clarity. He had difficulty in understanding the concern of the representative of Spain on article 17(1)(d). The relief would always be subject to local procedures.

10. Mr GRIFFITH (Australia) recalled that he had raised the issue of persons in control of a company who might be threatening the assets—for example, by sending money overseas or physically removing assets. Perhaps the point could be fully covered by the addition at the end of the text in square brackets of “or otherwise are in jeopardy”. Representatives of common law countries could have accepted the original text, but if it was to be changed he hoped that it would be possible to retain the very important concept of allowing orders to protect assets in jeopardy.

11. Ms. MEAR (United Kingdom) wondered what the words proposed by the representative of Australia would add, since prevention of removal of assets was dealt with in article 17(1)(b).

12. Mr. GRIFFITH (Australia) said that article 17(1)(b) only provided for ordering debtors to do or not do something. His concern was that, because of the nature of the assets, which might be in jeopardy, for example, because of dishonest controllers of a company, more than a court order might be needed; the capacity was needed, as provided for in the proposed subparagraph (c) of article 15(1), to entrust the administration of the assets to other persons. That was a crucially necessary additional power. Similarly, realization of assets must be possible in extreme cases when the assets were in jeopardy.

13. Mr TELL (France) agreed that the square brackets in subparagraph (c) should be removed. Regarding the addition proposed by the representative of Australia, he had himself, at the previous meeting, suggested a text including a reference to the removal of assets. However, he wondered if such an addition was really necessary, as removal of assets was covered by article 17(1)(b). To include such a reference in article 15(1)(c) might lead to confusion and actually weaken the text.

14. Ms. LOIZIDOU (Observer for Cyprus) said that the proposed wording for article 15, without the square brackets and with the addition proposed by the representative of Australia, was acceptable. She asked for clarification of the meaning of “execution of claims” in article 15(1)(a). Did that mean execution of decisions? She also suggested that subparagraph (c) should begin: “entrusting the administration and/or realization of ...”.

15. Mr. SEKOLEC (International Trade Law Branch) said that United Nations editorial practice did not permit the expression “and or”. Regarding the execution of claims, he thought that the expression was intended to include the execution not only of court decisions but also of any other executable titles.

16. Mr. ABASCAL (Mexico) said that the draft proposed by the Secretariat was acceptable in principle. In paragraph (1)(a), the text should refer to decisions, rulings and awards. With regard to evidence, it had been agreed at the 610th meeting of the Commission that obtaining of evidence would be subject to the country’s procedural rules, that point had not been included in the Secretariat’s proposal. In paragraph (1)(c), the square brackets should be removed and the bracketed text retained. The addition proposed by the Australian delegation would upset the compromise; “jeopardy” was a matter of subjective judgement, and his delegation opposed the addition.

17. Mr. BERENDS (Observer for the Netherlands) said that the text read out by the Secretariat was acceptable.

18. Mr. CHOUKRI SBAI (Observer for Morocco) considered the draft read out by the Secretariat to be fully satisfactory. However, in the light of his country’s legal system and the risk that the debtor might destroy or remove assets, he suggested that article 17(1)(d), which was referred to in the proposed subparagraph (b) of article 15(1), should be amended to include “listening to witnesses, requiring delivery of information concerning the debtor’s assets and liabilities, and the transfer of the court to the place of business in order to examine any incident referred to in the witnesses’ evidence”.

19. Mr. MAZZONI (Italy) said that, in general, he could accept the proposed formulation for article 15(1). In practice, the new formulation would be interpreted as inherently subject to the general principles of provisional relief. As previously drafted, it would have been interpreted differently.

20. He strongly recommended the removal of the square brackets in subparagraph (c). He had no strong feelings about—although not much sympathy for—the representative of Australia’s proposal; it would be acceptable if the majority were in favour of it. He fully supported the change proposed by the representative of Spain in the same subparagraph. Finally, in subparagraph (a), he wondered if the concerns expressed could be satisfied by speaking of “staying execution” without mentioning “claims”.

21. Mr. COOPER (Observer for the International Association of Insolvency Practitioners) said that his Association regarded the additional words proposed by the representative of Australia as quite essential. The provision in article 17(1)(b) would not be enough. In the real world, people ignored orders. What was needed was actual physical control of the property, as had been repeatedly pointed out in the Working Group.

22. Concerning article 17(1)(d), there seemed to be a view that the provisions should be restricted to the preservation of evidentiary material and to ensuring the presence of certain persons. But that would not suffice. Information might also be
needed in the urgent circumstances covered by article 15, it
must be possible to ask what ship the assets had been loaded
on, and similar questions.

23. Mr. GRIFFITH (Australia) said that the reference to
assets in jeopardy was absolutely necessary. Although some
had questioned its usefulness, since none had argued that it
would be harmful he felt that the Commission should add the
reference and remove the square brackets.

24. While "administration and/or realization" would make
good sense, in view of the Secretariat's explanation he would
support the formula "administration or realization".

25. Mr. SANDOVAL (Chile) said that the proposed compro­
mise represented a satisfactory outcome of the discussions. He
agreed with the removal of the square brackets and the substi­
tution of "or" for "and" proposed by the representative of
Spain. He was against the representative of Australia's pro­
posal since, as the representative of Mexico had pointed out, it
would involve a subjective element. The interpretation of "in
jeopardy" might extend the scope of the relief beyond the
intended in the consensus text.

26. Mr. WESTBROOK (United States of America) felt that
the proposed text represented a significant advance. He could
support it with or without the addition proposed by the repre­
sentative of Australia. The square brackets should be removed.

27. The CHAIRMAN, summarizing, said that the general view
seemed to be that the text read out by the Secretariat could
be accepted up to the end of subparagraph (b). In subparagraph (c)
"administration and" would become "administration or" and the
square brackets would be retained. Regarding the amendment
proposed by the representative of Australia, he had not sensed
any strong opposition to the proposal, despite some lack of sym­
pathy for it. He would therefore take it that the Commission
wished to amend the text accordingly.

28. Mr. MAZZONI (Italy) said that he had suggested the
replacement of the words "the execution of claims" in subpara­
graph (a) by the word "execution".

29. The CHAIRMAN said that the drafting group would ad­
dress that point.

30. Mr. ABASCAL (Mexico) said he did not agree with the
Chairman's summary. The Australian proposal had not been
supported, except by the observer for INSOL; what some
speakers had said was that it could be accepted if it were
considered necessary. Other delegations had specifically op­
posed it. The addition upset the compromise represented by the
text suggested by the Secretariat.

31. Mr. GRIFFITH (Australia) thought that, if the concept of
"jeopardy" contained a subjective element, so did the concept of
susceptibility to devaluation. He did not think that a compromise
was being upset: the purpose of seeking a formula different from
the original text, which many, if not most, delegations could
have accepted, had been to accommodate those unhappy with
that text. A compromise had been proposed by the representative
of France, and one component of the compromise proposal in its
original form had been an attempt to take account of his delega­
tion's strong concern about assets in jeopardy.

32. Mr. WESTBROOK (United States of America) felt that
the Chairman had accurately described the tenor of the Com­
mision's discussions on the entire article 15, and that the text
should go forward on that basis.

33. The CHAIRMAN said he took it that article 15 was
approved, on the basis of the text read out by the Secretariat at
the beginning of the meeting and the changes that he had just
indicated.

Article 16

34. Mr. SEKOLEC (International Trade Law Branch), intro­
ducing the Working Group's text for article 16(ACN.9/435,
annex), said that article 16 differed from articles 15 and 17 in
two important aspects. Firstly, the consequences listed in para­
graph (1) arose automatically, or "mandatory". They were not
subject to the discretion of the judge. Secondly, the effects
resulted from recognition of foreign main proceedings, but not
foreign non-main proceedings. A restriction on the automatic
effects was expressed in paragraph (2), where it was said that
the scope of the effects of stay was subject to exceptions and
limitations pursuant to the laws of the enacting State. For
example, the right to transfer or dispose of assets would not
continue for disbursements or transfers made in the ordinary
course of business, because a total suspension of the right to
transfer would be tantamount to destroying the business. It
had also been recognized that total stay of commencement of
actions might cause a claimant to lose the right to claim-for
example, if the period of limitation was about to expire. That
situation was covered in paragraph (3). Paragraph (4) was
intended to ensure that the stay of the initiation of proceedings
did not limit the right to request commencement of collective
proceedings in the enacting State. Consideration of subpara­
graph (5), which was in square brackets, might perhaps be
deferred until article 22, which dealt with concurrent proceed­
gons in general, was taken up.

35. Ms. NIKANJAM (Islamic Republic of Iran) thought that
paragraph (2) should explicitly mention certain exceptions, such
as debts to employees. In paragraph (3), she found the expression
"to preserve a claim against the debtor" confusing and sought
clarification.

36. Mr. SEKOLEC (International Trade Law Branch), refer­
ing to paragraph (3), drew attention to paragraph 31 of docu­
ment ACN.9/435. As explained there, the observation had
been made in the Working Group that the then text of article
16 did not make it clear whether national rules on the limita­
tion period would still apply to actions stayed under
subparagraph (a). To ensure, where the limitation period con­
tinued to run, that the claimant did not lose the claim because
of the effects of subparagraph (a), the addition of paragraph (5)
was suggested to allow such a claimant to initiate a claim.

37. Mr. ABASCAL said the principle behind article 16 was
acceptable. However, paragraph (1)(a) did not indicate when or
how current claims would be decided. The logical solution
would be for the judge to decide them, but that raised
problems in the case of valid arbitration agreements
since, under the 1958 New York Convention and the 1975
Inter-American Convention on International Commercial Arbi­
tration, arbitration proceedings could not be submitted to a
judge; such a procedure would mean ignoring the arbitration
agreement and violating the Conventions in question.

38. Mr. WIMMER (Germany) said he had no problem with
the interruption of pending action. His key concern was that the
scope of the stay was independent of the scope of stay in the
originating jurisdiction. A debtor who might not be divested of
his powers in the home country would be divested of them
abroad. It would be illogical to go beyond the home country's
regulations in the area. He would prefer to link the scope of the
stay to that prevailing in the home country, and he proposed
that article 16(1) should be amended to that effect.
39. Mr. MAZZONI (Italy) thought that article 16 would be the logical place to define the effects of recognition not only of a foreign main proceeding but also of a foreign non-main proceeding, and the effects when a local main proceeding was pending. Those effects were not clearly described in article 22, but were to be inferred, largely at the discretion of the court. He wished to indicate, at that stage, the need for a positive definition of the effects of recognition in the two cases to which he had referred.

40. Secondly, the representatives of Mexico and Germany had raised important issues. An exception should be made in the case of arbitration for the reasons given by the representative of Mexico. Perhaps it should be made clear in the exception that the proceeding could continue to the award stage, but that enforcement should be stayed. Regarding the duration of stay, perhaps the Commission should set a time-limit or define a way of determining the duration of the effects of recognition. In a bankruptcy proceeding, the effects normally ceased when the proceeding closed. In the present case, either the duration should be that of the foreign main proceeding or, if the Commission thought it appropriate, it should provide for the possibility of an earlier end to the effects of recognition if, for example, there were no more assets or interests in the enacting State to be taken care of by the recognition.

41. Mr. WSITSORA-AT (Thailand) said that he was concerned about the automatic effects of recognition. He understood that the purpose was to facilitate trade, through a more predictable outcome of recognition. However, while some countries had a liberal approach to bankruptcy, in many others there was still a social stigma attached to it. In such countries, the court and judicial process tried to prevent bankruptcy, and the requirements were very stringent. If someone from abroad, who had been able to obtain a bankruptcy order easily, came to a country where there was a stigma attached, it would cause difficulties if the model law allowed automatic stay. His delegation could go along with the majority, but wished to point out that the proposed provisions might deter many countries from accepting the model law. A solution might be to amend subparagraph (2) to make the “requirements”, rather than the scope of the stay and suspension, subject to local law.

42. Mr. MÖLLER (Finland) said that he could accept the text despite the problem mentioned by the representative of Germany because the effects applied only to main proceedings. The representative of Mexico had touched on the relationship between the provision in paragraph (1) and the 1958 New York Convention, but there was nothing in that Convention about the relation between the duty to recognize an arbitration agreement and insolvency law. If there were a conflict, which he did not think was the case, the New York Convention would prevail, at least in his jurisdiction. Moreover, domestic arbitration agreements were not covered by the New York Convention. He therefore doubted whether the concerns of the representative of Mexico were justified.

43. Mr. WESTBROOK (United States of America) said that the issue raised by the representative of Mexico on the relationship between arbitration and insolvency was a technical point. In his view, the representative of Finland was correct. The effects applied only to main proceedings, and the effects when a local main proceeding was pending. Those effects were not clearly described in article 22, but were to be inferred, largely at the discretion of the court. He wished to indicate, at that stage, the need for a positive definition of the effects of recognition in the two cases to which he had referred.

44. On the point raised by the representative of Italy, the issue had been discussed in depth in the Working Group. The application of article 16 only in the case of main proceedings was the key point which had led to acceptance of article 16. Nothing happened on recognition of a non-main proceeding except in article 17, where a judge issued an appropriate order. He suggested that discussion of the issues in article 16(5) should be postponed until the consideration of article 22, after which article 16(5) could be looked at again if necessary. It was important to consider the issue of concurrent proceedings as a whole before addressing the narrow aspect in article 16(5).

45. The suggestion to allow for a limitation on the stay in article 16(1) by reference to the law of the home country was one that had been discussed many times in the Working Group and not received widespread support. A difficulty was that the requirement to understand the complexities of a foreign stay order might be very onerous for local courts. Furthermore, it seemed to him that, in the case of recognition of a foreign main proceeding, the debtor could hardly complain of suffering from a law stricter than in his own country. The same point should be made concerning the comments of the representative of Thailand concerning the social stigma problem. What was under consideration was a stay of proceedings imposed on a debtor the centre of whose main interests was abroad. A debtor must accept that he might be subject to embarrassment in a country other than his own.

46. Mr. AGARWAL (India) noted that the Working Group had changed “shall be stayed” and “shall be suspended” in article 16(1) to “are stayed” and “are suspended”. He assumed that the provisions were non-mandatory and that the court in the country recognizing the foreign main proceeding would have discretion. To make that clear, he suggested that the wording “may be stayed” and “may be suspended” should be used.

47. Mr. TELL (France) understood the concerns of the representative of Germany, because the European Union Convention on Insolvency Proceedings, article 17, provided that recognition produced the same effects as under the law of the State where proceedings were opened, unless otherwise provided. However, the Working Group had felt that the aim of uniformity would not be achieved if the effects varied from one State to another, as could result from referral to the law of the State in which proceedings had been opened. Paragraph (2) of article 16 subordinated the scope of the effects under subparagraphs (a) and (b) of paragraph (1) to exceptions applicable under national law. He supported that, because it took account of concerns that had been expressed. However, it might be desirable to amend the text in order explicitly to allow the judge to terminate the measures.

48. He did not support any reference to non-main proceedings. The concern in the Working Group had been to separate the effects of main and non-main proceedings. It was not desirable for the two to have the same effects. The non-main proceeding was covered in article 17.

49. Paragraph (5) was important. However, the matter could be discussed in the context of article 22 as long as article 16 remained open until a decision was taken on article 22.

50. Mr. GLOSSEND (Observer for the International Bar Association) said that the specific concern of the representative of Mexico on possible conflict with conventions on arbitration was addressed in article 3. In the event of conflict, the convention would prevail. The issue of the scope of stay, and the problem if
the stay available in the foreign proceeding went beyond that in the home country, could be addressed under article 19, which provided for modification or termination of the stay. It did not seem a good idea to fix a time limit for the stay, when it was appropriate, termination of the stay could be requested under article 19. The issues raised by the Thai delegation had been considered at length, but it had not been found possible to draft any provision to accommodate that delegation’s concerns which did not eviscerate the part of the model law under consideration. The idea behind the provisions proposed by the Working Group was that, very early in the proceeding, there should be a breathing-space and a freeze on actions by and against the debtor until the foreign representative could get control of the situation. To make it difficult to obtain recognition and freeze proceedings would be directly contrary to the purpose of the model legislation. In any case, article 19 could be applied. The suggestion by the representative of India that the reliefs should be discretionary was directly contrary to the broad consensus reached in the Working Group sessions. Efficient and automatic relief should be at the heart of the law. It should be borne in mind, however, that the stay did not prevent local parties from starting local proceedings.

51. Mr. ABASCAL (Mexico) agreed with the observer for IBA that article 3 resolved the problem of incompatibility with a convention. However, a provision in article 16 would in that case be inapplicable, because nearly all the countries represented were parties to the 1958 New York Convention. That Convention covered all arbitration agreements, including domestic agreements. Regarding the reference to incapacity, that meant incapacity not at the time of the dispute but at the time of conclusion of the arbitration agreement. Moreover, the provision would be discriminatory because international arbitration proceedings took place in third countries, and the judge would have no power to stay proceedings abroad. What was important was that the administrator should be allowed to participate in arbitration proceedings.

52. Mr. MAZZONI (Italy) said he had not intended that regulation of the effects of non-main proceedings and other subjects should be included in article 16. However, the other situations he had referred to should be covered in a positive way somewhere. The effects of recognition should not be left to the discretion of the courts.

53. Ms. INGRAM (Australia) said that article 16 was central to establishing an international regime for cross-border insolvency. It provided the necessary certainty for those administering large international insolvencies requiring speedy access to effective relief. A standard was needed, and she could not agree that the effects should be decided at local level. The approach was, of course, new to many countries, but it was important and Australia hoped that jurisdictions would look objectively at the advantages for cross-border administration. As far as the effects of non-main proceedings were concerned, there were none other than those set out in article 17. Concurrent proceedings should be dealt with under article 22, with reference back to article 16 if necessary.

54. Mr. OLIVENCIA (Spain) agreed in principle with article 16. Regarding paragraph (1)(a), he agreed that the commencement of individual actions should be stayed, but proceedings already commenced could be allowed to continue. Execution, whether of court decisions or of arbitration awards, should be stayed. The collective nature of the proceeding should prevail even over international arbitration agreements. If domestic decisions could not be executed, why should foreign awards be executed? The problem of conflict with treaties would have to be looked at, but the principle was clear. That was yet another reason why the rules in the model law should be extended and become model provisions for treaties. The fate of an insolvency proceeding could not be allowed to depend on a foreign arbitration award.

55. The purpose of paragraph (3) was clear, but the formulation was neither clear nor appropriate. There was no need to oblige a claimant to commence an action in order to preserve a claim. It would be enough to say that recognition interrupted the limitation period. The individual action would be integrated in the collective proceeding.

The meeting rose at 5.05 p.m.

Summary record of the 613th meeting

Thursday, 15 May 1997, at 9.30 a.m.

[A/CN.9/9435]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 9.40 a.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (continued) [A/CN.9/9435]

Article 16 (continued)

1. The CHAIRMAN said that a number of issues had emerged at the previous meeting. One question was whether in principle, a foreign representative in a main proceeding should be accorded relief greater than that available to him in his own country. Another was whether the stay of individual proceedings concerning debtors’ assets should also apply to arbitration proceedings. A further issue concerned the effects of recognition in jurisdictions where bankruptcy proceedings carried a stigma, and the consequences of importing the effects of an insolvency proceeding from a country where bankruptcy was not stigmatized into one where it was. It had also been suggested that the provisions on the effects of recognition of main proceedings and of non-main proceedings should be brought closer together.

2. Mr. ABASCAL (Mexico) said that attention had been drawn to article 19, which included wording in square brackets that would allow the stay to be lifted and arbitration to continue. That would remove the doubts he had expressed earlier regarding article 16; his delegation could agree to the article provided that the square brackets in article 19(3) around the wording referring to the stay or suspension pursuant to article 16(1) were removed, and the wording within those brackets adopted.
3. Mr. KOIDE (Japan) sought clarification of article 16, paragraphs (1)(a) and (3). In his country, the limitation period stopped running simply upon a demand to pay, although such a demand had no enforceable character. It was not clear if such a demand, which was not a judicial proceeding, was covered in paragraph (1)(a). In any case in his country there would be no need for paragraph (3).

4. Mr. HERRMANN (Secretary of the Commission), replying to the representative of Japan, said that, in a country where national law provided other means to preserve the right, such as demand for payment, paragraph (3) might seem redundant. However, he would like to suggest that, even in such a case, the provision should be included when the country enacted the model law. It would do no harm and might do good. In the international arena, the question might arise which law determined what measures interrupted a limitation period—whether it was the law of the forum, the law that governed the substance or another law. Another reason for retaining the provision had to do with the character of a model law. If the provision was missing, that might create the wrong impression that the legislator had not wished to allow the exception, whereas in fact it was not needed because there was an alternative way of preserving a claim.

5. Mr. CHOUKRI SBAL (Observer for Morocco) said that in his country the stay of individual actions applied to creditors in respect of debts incurred prior to the insolvency proceeding. For debts incurred after the insolvency proceeding had opened, it no longer applied. He asked whether paragraph (1)(a) would apply to debts incurred after the opening of proceedings.

6. Secondly, if a decision had been given prior to the opening of proceedings, should execution of that decision be suspended? If so, that should be stated explicitly.

7. Mr. SEKOLEC (International Trade Law Branch) said that it had been the understanding of the Working Group that the provision covered not only commencement and continuation of individual actions, but also execution of any decisions made. Regarding debts incurred subsequently, he thought that a plain reading of the text led to the conclusion that they were also covered.

8. Mr. DOYLE (Observer for Ireland) said that he had originally had some difficulties, especially concerning automatic stay of proceedings or execution, not because it was undersirable in itself, but because he had constitutional problems with the concept. On reflection, however, he saw that article 19 should cover most of the difficulties, and he therefore supported article 16.

9. Mr. GLOSBA (Observer for the International Bar Association) suggested that, to take into account the issues raised by the representative of Italy at the previous meeting, two amendments should be made to article 16. Firstly, the chapeau of paragraph (1) should begin: "Except as provided in article 22, upon recognition of a foreign main proceeding ...." Secondly, a new final paragraph should be added to article 16, reading: "Upon recognition of a foreign non-main proceeding, there shall be no automatic effects, but the foreign representative may request relief under article 17 and may take other actions authorized in this law[sect]."

10. The CHAIRMAN said that, if the proposal were accepted, the heading of article 16 would have to be changed.

11. Mr. MAZZONI (Italy) supported the suggestion made by the observer for IBA. The change would improve the presentation of the model law in that articles 15, 16 and 17 would all relate to recognition of foreign proceedings, and the alternating references to main and non-main proceedings would be avoided.

The suggested reference to article 22 at the beginning of article 16(1) should be understood as referring specifically to the proposed subparagraph of article 22 where the problem of a possible conflict between a pending local main proceeding and the recognition of a foreign main proceeding would be dealt with.

12. Mr. HERRMANN (Secretary of the Commission) said that the suggestion raised problems as far as drafting was concerned. For example, if the suggested wording were accepted, it would be stated twice that, upon recognition of a non-main proceeding, the foreign representative might do certain things. Moreover, the suggested new paragraph did not mention the conditions referred to in article 17, and that might give rise to doubts.

13. The CHAIRMAN thought that an appropriate formulation could perhaps be worked out in informal consultations.

14. Mr. OLIVENCIA (Spain), referring to the question of the stay of proceedings, said that his interpretation of article 16(1)(a) was that, once the foreign proceeding had been recognized, both the initiation of new individual actions and the continuation of individual actions already initiated would be stayed. As he had said at the previous meeting, his delegation thought that individual actions began prior to recognition might be allowed to continue. In any case, however, execution had to be stayed. In view of the agreement to amend article 15 to mention stay of execution, it would seem logical to refer explicitly to the execution of decisions, including arbitration awards. He proposed that article 16(1)(a) should be amended accordingly.

15. Discussion of the issue of concurrent proceedings should be deferred until consideration of article 22. He shared the concern of the Secretariat regarding the suggestion made by the observer for IBA.

16. Mr. SEKOLEC (International Trade Law Branch) said that to allow existing actions to continue under paragraph (1)(a) would involve a substantive change. On the other hand, no objection had been raised to the suggestion for a drafting change to make it clear that execution would be stayed.

17. Mr. SHANG Ming (China) said that articles 16 and 17 touched on very significant and far-reaching policy issues and legal issues. In that connection, he was puzzled by the relationship between articles 16 and 17, some of whose elements overlapped, and by the distinction made between "effects" and "relief".

18. Another problem concerned the consequences that a decision on an insolvency case in one State would have for other States, as referred to already by other speakers. The consequences mentioned in article 16(1) would affect innocent third parties and customers. Moreover, article 16 provided for proceedings to be stayed and rights suspended, but did not state what would happen subsequently. Article 17 allowed for assets to be entrusted to another person, but did not say when they could be disposed of again. When could local buyers or creditors get relief? He understood that foreign creditors would be enabled to claim their rights, but that should not be at the expense of local creditors or buyers. How could fair treatment be ensured? Article 19(2) would allow the court to subject relief to appropriate conditions; did that mean that the strict effects of articles 16 and 17 could simply be reversed by the court? The group of articles needed to be looked at carefully to ensure that the model law could be understood.

19. Mr. SEKOLEC (International Trade Law Branch) said that the issue raised by the representative of China was what protection could be provided by the court recognizing the foreign proceeding for the benefit of local creditors or other innocent parties in the recognizing State. The Working Group had
discussed that problem at length, and the solution proposed appeared in paragraphs (2) and (3) of article 19. Under article 19(2), a court might subject relief to certain conditions. The word used was "relief", the term employed in articles 15 and 17. The understanding of the Working Group, as indicated in paragraph 78 of document A/CN 9/435, was that the paragraph made provision for additional conditions for discretionary relief under articles 15 and 17. The way out of automatic consequences under article 16 was addressed in article 19(3), in the text currently in square brackets, which would allow the court in the recognizing country to restrict or otherwise modify the automatic effects that ensued under article 16. That was the system of interplay between articles 15, 16, 17 and 19.

20. Ms. MEAR (United Kingdom) agreed with the Secretary's observations and thought that cross-references and duplication should be kept to a minimum. As a principle, the text should always be read as a whole. Apparent problems could often be solved by reference to other provisions in the text.

21. Secondly, it was clear from article 16(1)(a) as currently drafted that existing actions were stayed, but it was not entirely clear that judgements already obtained or decisions already made by the date of recognition could not be enforced. A reference to stay of execution should therefore be included, perhaps in line with the revised text of article 15 that had already been agreed on.

22. Thirdly, she supported the objectives and principles set out in article 16. It was an essential part of the scheme, dealing with the urgent need to maintain the status quo on recognition.

23. Ms. SABO (Observer for Canada) agreed with the Secretary on the question of drafting style. The text should be read as a whole. It was not necessary to state specifically that recognition of a non-main proceeding did not produce any effects. However, if some States would like such an explicit statement, it could be contained in a separate article 16 bis headed "Effects of recognition of a foreign non-main proceeding". In the text suggested by the observer for IBA, she would prefer a reference to "mandatory" rather than "automatic" effects. The provision could state that recognition of a non-main foreign proceeding would not produce any mandatory effects, and then continue as suggested by the observer for IBA.

24. She agreed that there should be a specific reference to stay of execution in article 16(1)(a).

25. The CHAIRMAN said that a separate article might be the solution to the problem of how to refer to the issue of non-main proceedings. He asked the Secretariat to see whether a suitable text could be drafted.

26. Mr. TELL (France) said that the problem addressed by the representative of Italy arose from the fact that article 16 dealt with automatic effects of a main proceeding, whereas article 17 concerned measures following recognition of a main or non-main proceeding. He supported the approach suggested by the observer for Canada. He also supported the United Kingdom representative's proposal concerning stay of execution.

27. Mr. WIMMER (Germany) said that a key concern of his, which he had raised in the Working Group, was that the definition in article 2(a) of a "foreign proceeding" included an interim proceeding, which meant that, if an interim proceeding was recognized, that would stay any pending lawsuit. That seemed inconsistent: article 15 provided for no final recognition of a final, opened foreign proceeding while, under article 16(1), a proceeding opened only on an interim basis would lead to the interruption of pending lawsuits. The effects of article 16 should be restricted to a final, opened main proceeding.

28. Mr. MÖLLER (Finland) agreed with the representative of the United Kingdom that cross-references should be kept to the minimum. It would not add to the clarity of article 16 to mention non-main proceedings. The model law should be read as a whole. He also agreed that there should be an explicit reference to execution in paragraph (1)(a).

29. He was not sure that he followed the argument of the representative of Germany. He did not see the connection with article 15. That article dealt with what happened before the bankruptcy was recognized.

30. Ms. NIKANJAM (Islamic Republic of Iran) said that the issue raised by the representative of the United Kingdom was covered by paragraph (1)(b), since that would have the effect of preventing execution against the debtor's assets.

31. Mr. WESTBROOK (United States of America) said that the representative of the Islamic Republic of Iran was quite correct that paragraph (1)(b) was in fact adequate. However, it was merely a drafting matter, since there was a common understanding that execution was included in paragraph (1)(a). The issue of interim proceedings raised by the representative of Germany had been discussed many times. Anyone concerned about that issue should submit a proposal for consideration. However, the edifice of articles 16 and 17 had been carefully constructed over two years. There was a danger that attempts at refinements would lead to its collapse. The proposal by the observer for Canada related to concerns which were already covered in the existing draft. A new article on non-main proceedings was quite unnecessary. Under article 16, creditors were protected mandatorily upon recognition of a foreign main proceeding. Under article 17, for both main and non-main proceedings, other reliefs were carefully considered by the local court.

32. Mr. CHOUKRI SBAI (Observer for Morocco) said that article 16(3) would prevent loss of rights because of the expiry of a limitation period, and would allow appeals. However, provision should perhaps be made for the foreign representative or a person appointed by the court to have access to proceedings. If a foreign representative could not start proceedings, that might mean that a deadline could not be met for an appeal to be lodged, that a creditor could initiate individual proceedings not in conformity with article 16(3), and that the foreign representative might not know of steps taken by the creditor. Perhaps the provision could refer to the need for the foreign representative or a person appointed by the court to be allowed to commence individual actions or proceedings.

33. Mr. SEKOLEC (International Trade Law Branch) said that the understanding of the Working Group in preparing paragraph (3) had been that it referred to actions by creditors, not to actions of the foreign representative. As to possible actions of the foreign representative in individual proceedings under way in the country, that point was addressed in article 20.

34. Mr. TELL (France) said that subparagraph (b) of paragraph (1), which had been mentioned by the representative of the Islamic Republic of Iran, met his concerns only partially, since it referred only to transferring assets, etc. There should be a specific reference to execution in subparagraph (a). It was, however, a drafting matter.

35. Mr. HERRMANN (Secretary of the Commission) said that the representative of France had raised a useful point. He would have interpreted paragraph (1)(b) as referring to voluntary disposal of assets, not to enforcement action against the debtor. If there was a suggestion that paragraph (1)(b) should be understood in another way, that should be clarified by the Commission.
36. Mr. OLIVENCIA (Spain) considered that an express men­
tion of execution was needed in article 16(1) to ensure consist­
ency with the amendment to article 15 already agreed on.
37. Ms. MEAR (United Kingdom) agreed with the Secre­
tary’s interpretation of paragraph (1)(b). It clearly dealt with
voluntary transfers.
38. Mr. TELL (France) said that was also his interpreta­tion
of paragraph (1)(b).
39. The CHAIRMAN said that the Secretary had some sugges­tions to make, following informal consultations with dele­
gations.
40. Mr. HERRMANN (Secretary of the Commission) said it
was suggested that amendments should be made to the first
paragraph of articles 16 and 17 to emphasize that the reference
to main proceedings in one case and to main or non-main
proceedings in the other. Article 16(1) would begin: “Upon rec­
ognition of a foreign proceeding which is a main proceed­
ing, ...”. Alternatively—and that was a matter for the drafting
group—it could begin: “If the foreign proceeding is a main
proceeding, ...”. Article 17(1) would begin: “Upon recogni­tion
of a foreign proceeding, whether a main proceeding or a non-
main proceeding, ...”. The difference would thus be high­
lighted but there would be no separate paragraph or article.
41. Regarding article 16(1)(a) and the question of execution
of actions, the Secretariat suggested the addition, after the
word “liabilities”, of the words “and executions against the
debtor’s assets”. The drafting group could consider the alterna­tive possibility of covering execution in a separate subpara­
graph.
42. Mr. MAZZONI (Italy) supported the proposed changes.
At a later stage, he would propose an addition to article 13 to
make it clear that in the model law the term “recognition” had
a special meaning. Otherwise there would be a risk of misin­
terpretation.
43. Ms. SABÓ (Observer for Canada) did not think there was
a need for a provision specifically dealing with the effects of
a non-main proceeding. The proposal presented by the Secre­
tary was acceptable.
44. The CHAIRMAN said that another issue to be resolved
concerned the effects of the recognition of interim proceed­
ings.
45. Mr. WIMMER (Germany) proposed that the chapeau of
article 16(1) should be amended to read: “Upon recogni­tion
of a foreign main proceeding, with the exclusion of proceed­
ings opened only on an interim basis.” That would cover his con­
cern and harm no one.
46. Mr. COOPER (Observer for the International Associa­tion
of Insolvency Practitioners) said that he was against that pro­
posal. Article 2(a) defined a “foreign proceeding” as includ­ing
an interim proceeding. Article 2(d) defined a “foreign repre­
sentative” as including a person appointed on an interim basis.
It had been agreed in the deliberations of the Working Group
that so-called interim proceedings should be covered by the
model law. The reason lay in a particular procedural aspect of
insolvency law in most countries of the Commonwealth: a
provisional liquidator could be appointed to a company in
financial difficulties if evidence was presented to a court that
the company was insolvent, that it was not under proper control
and that there was a danger that, unless orders and control
were established, the assets would be dissipated. That was the type
of situation referred to in article 2(a) and (d). The procedure,
albeit called “provisional” or “interim”, nearly always led to
a final order that the company be liquidated.
47. On behalf of those countries that had had such a procedure, he
urged that in the case of a main proceeding as defined in the
model law, where application for recognition was made, the
automatic effects of article 16 should apply. Immediate auto­
matic effects of that nature would be particularly necessary in
such cases. The only compromise he could contemplate would
be, perhaps in article 16, to empower the foreign representa­tive
or the court to deny the automatic relief in the case of an
interim proceeding. He could not agree that interim proceed­
ings should simply be excluded from article 16.
48. Mr. SEKOLEC (International Trade Law Branch) said it
seemed to the Secretariat that the suggestion made by the pre­
vious speaker as a compromise would be covered by article
19(3), which offered the possibility of restricting or lifting the
automatic consequences of article 16 at the moment of recog­
nition.
49. Ms. INGRAM (Australia) said that, in countries like hers,
most major liquidations were preceded by “provisional” liqui­
dation, which meant a substantive winding-up proceeding. It
was simply that the final orders had not yet been made. The
definition of “foreign proceeding” in article 2(a) made it clear
that the proceedings were ones in which the assets and affairs
of the debtor were subject to control or supervision by a court.
Unless interim proceedings were included, article 16 would be
largely redundant from Australia’s viewpoint.
50. Mr. TELL (France) asked what was meant by a provi­sional or interim proceeding. Was it a matter of provisional
decisions, subject to appeal? In his country, most decisions
were provisional until a final decision by the highest court.
51. Mr. SEKOLEC (International Trade Law Branch) said he
did not think that the Working Group had intended “interim” to
mean “subject to recourse”. A decision, even if technically
subject to appeal, had effects and its recognition abroad could
be requested. What was referred to was the situation in some
countries where an administrator was appointed on an interim
basis and might be confirmed later or replaced; the proceed­ing
as such had and should have all the characteristics set out
in article 2(a). Likewise, the insolvency administrator must
satisfy the definition in article 2(d).
52. Mr. MAZZONI (Italy) supported the position of the repre­
sentative of Australia and the observer for INSOL. The Working
Group had taken the position that it should not examine the
specific features of insolvency proceedings in various coun­
tries. That might have caused problems for enactment. The courts
would have to take foreign proceedings as they were. Although
some proceedings in common law countries were called provi­sional
proceedings, the important thing was that insolvency pro­
cedings, as defined in article 2, should be covered by the law.
So-called provisional proceedings, if they satisfied the defini­
tion, should also enjoy the benefits of recognition.
53. Ms. SABÓ (Observer for Canada) said the question raised
by the representative of France might be a matter of language.
In Canada, the type of appointment referred to was called an
“interim appointment” (“nomination intermédiaire”), not a “pro­
visional appointment”.
54. Mr. HARMER (Observer for the International Associa­tion
of Insolvency Practitioners) said that, in one well-known
case, administrators had been appointed on a provisional basis
in December 1991 and had not been finally appointed until
April 1992. Meanwhile, the provisional liquidators had been
able to recover some 200 million pounds secreted around the
world. One should not be misled by terminology. Interim pro­
cedings must be included if the provision was to have any
practical value.
55. Mr. BERENDS (Observer for the Netherlands) said that he would have difficulty in supporting the representative of Germany's proposal. In his country also, there were interim proceedings. Such proceedings should be covered under article 16.

56. Mr. CALAGHALAN (United Kingdom) agreed that interim proceedings should be covered. His country had procedures similar to those described by the observer for INSOL. In almost all cases, the provisional liquidator was the same person as was finally appointed, and courts expected that that would be the case. Article 19 would offer reassurance to those who had concerns. It was very important that the liquidator should have powers to preserve assets until the final hearing.

57. Mr. AGARWAL (India) supported the view of the representative of Australia and the observer for INSOL.

58. The CHAIRMAN felt that there was little support for the proposal that article 16 be modified to exclude interim proceedings. An outstanding issue was whether stay should apply to proceedings already under way at the time of application. The Secretariat could perhaps explain the suggestion that had been made.

59. Mr. SEKOLEC (International Trade Law Branch) said that the representative of Spain, at the previous meeting, had suggested that individual actions and proceedings under way at the time of recognition should be allowed to continue, although execution of any resulting decision would be stayed.

60. Mr. MAZZONI (Italy) supported the suggestion. It was important to ensure that there was no execution. As to whether litigation should continue, there should be no interference with the procedural traditions of different countries and, if national law permitted continuation of proceedings in such a situation, it should be respected. It would not seriously interfere with the goals of recognition to allow proceedings which had already commenced to continue. Only commencement and execution should be stayed.

61. Mr. TELL (France) said that a relevant issue was the scope of article 16(2). That issue was touched on in paragraph 33 of the Working Group's report (A/CN.9/435). Examples were given of exceptions that were not to be considered incompatible with paragraph (1) of the article. In French law, a decision to open insolvency proceedings suspended all action by creditors, but only for debts that had originated prior to that decision. Could France interpret paragraph (2) as allowing it not to stay actions for debts arising subsequent to the decision? If his interpretation of paragraph (2) was correct, paragraph (1)(a) could remain as it was. Otherwise, a general provision staying the continuation of all proceedings would cause considerable difficulty in some countries.

62. Mr. WESTBROOK (United States of America) said that the point just raised would perhaps be a matter to be decided under French law. However, to provide in general for the continuation of actions would mean a substantive change, and one that should not be made. Paragraph (2) was sufficient.

63. Mr. OLIVENCIA (Spain) said that he had made his suggestion in an attempt to meet the concerns expressed in relation to arbitration, which had now been resolved. He had no interest, therefore, in maintaining the suggestion.

64. Mr. TELL (France) said that his general acceptance of article 16 had not changed. He had merely asked for guidance as to how paragraph (2) was to be interpreted.

65. Mr. ABASCAL (Mexico) reaffirmed that his delegation accepted article 16, although it considered that article 16(1) might prove misleading in view of the fact that stay of proceedings, according to other paragraphs of the same article, was subject to domestic laws relating to insolvency, that under article 3 it would be subject to obligations arising out of treaties and that it could be lifted pursuant to the provisions of article 19.

66. Mr. HERRMANN (Secretary of the Commission) said that reference had been made to the specificity of arbitration compared with litigation. However, the Secretariat did not share the view that there was a possible conflict between the proposed provisions and the 1958 New York Convention or similar conventions. Under arbitration agreements, the parties thereto agreed to take disputes out of court jurisdiction. The conventions required the States parties to recognize arbitration agreements; that meant that the parties to an arbitration agreement could not bring their dispute to a court, but it did not mean that States parties could not have provisions in their law which might, in practical or legal terms, prevent such a party from initiating or participating in arbitration proceedings. Nor did the fact that there were treaties covering arbitration make it different from litigation; there were treaties dealing with litigation too.

The meeting rose at 12.30 p.m.
articles 15 and 17 was that the relief under article 17 was relief that might be granted upon recognition, whereas article 15 concerned relief that might be granted on application for recognition. Article 17 applied to both main and non-main foreign proceedings. However, paragraph (3) of article 17 said that, in the case of a foreign non-main proceeding, the court must be satisfied that the relief related to assets under the authority of the foreign representative or that any information sought was required for the purposes of the foreign non-main proceeding.

3. Paragraph (1) listed the various reliefs that might be granted. Paragraph (2) dealt with a situation where the court might consider it appropriate to authorize distribution of assets and attached the proviso that the court must be satisfied that the interests of creditors in the recognizing State were adequately protected.

4. Mr. MAZZONI (Italy) said that he supported the proposed text in general, but had doubts regarding paragraph (3), including the word “authority”.

5. Ms. NIKANJAM (Islamic Republic of Iran) said that she was generally satisfied with the content of article 17. However, she wondered if the measure provided for in paragraph (2) would be taken at the request of the foreign representative, as in the case of paragraph (1), according to the on-site inspection had already been graphed to include a reference to on-site inspection had already been taken. It should be possible to ascertain, on the spot, whether the assets were properly protected. She recalled that the observer for Morocco’s suggestion rapidly. It should be possible to ascertain, on the spot, whether the assets were properly protected.

6. Mr. SEKOLEC (International Trade Law Branch) said he would assume that, if the court entrusted the distribution of part or all of the assets to the foreign representative or another person, it would be at the request of that person.

7. Mr. KOIDE (Japan) thought that mere reference to “distribution” was insufficient. The paragraph should also cover the transfer of the assets to the foreign State, and he proposed the insertion of the words “turnover of” or “the before the word “distribution”.

8. Mr. SEKOLEC (International Trade Law Branch) said that the word “authority” had been suggested by the expression used in article 2(d), which spoke of the foreign representative being “authorized” to administer the reorganization of the debtor’s assets. Regarding “turnover”, it was felt that the notion of “entrusting” encompassed the idea of turning over the assets. Perhaps it was just a drafting matter.

9. Mr. CHOUKRI SBAI (Observer for Morocco) thought that article 17, paragraph (1)(a), should be in line with article 16(1)(a), as amended, and refer specifically to stay of execution.

10. Article 17(1(d)) spoke of what had to be done to obtain evidence or information. That would be particularly useful if there might be perishable assets that would need to be sold rapidly. It should be possible to ascertain, on the spot, whether that was the case, and there might be a need for some sort of inquiry. He suggested that wording should be added to paragraph (1(d)) to provide for physical inspection of assets on the site or the conduct of inquiries regarding such assets.

11. Mr. SEKOLEC (International Trade Law Branch) agreed that the considerations expressed in favour of modifying article 16(1)(a) to refer expressly to stay of execution probably also applied to article 17, so a consequential change could be made there. He recalled that the observer for Morocco’s suggestion to include a reference to on-site inspection had already been put forward during the discussion of article 15.

12. Mr. BERENDS (Observer for the Netherlands) said that the idea behind articles 16 and 17 was that on recognition there were automatic effects, before the court had time to ponder the issue, and that once the court had had time to reflect, the relief requested under article 17 might be granted. Perhaps “Upon recognition” should be changed to “After recognition”.

13. Mr. ABASCAL (Mexico) said that, in paragraph (2), the reference to the foreign representative being authorized to distribute all or part of the debtor’s assets might be interpreted to mean that he could dispose of them at his own discretion. It would be desirable to say that he could distribute them in accordance with the law governing the insolvency proceeding in which he had been appointed or in accordance with the powers deriving from his appointment. With regard to the concern expressed by the representative of Italy, rather than speaking of “authority” the text should refer to assets which the foreign representative had been entrusted with administering.

14. Mr. MAZZONI (Italy) said that he was becoming more and more concerned, because it seemed that the proposition that no effects flowed from the recognition of a non-main proceeding was incorrect. Apparently, a very important effect was being given to recognition of a non-main proceeding. The foreign administrator in a foreign non-main proceeding was being given authority to administer assets, prior to any application for relief. In actual fact, relief was being granted because of recognition of the fact that the foreign administrator had power over or title to assets. Perhaps it was determined that he had that power; probably, the only basis would be the recognition of the foreign non-main proceeding. Would recognition of the foreign non-main proceeding mean that the foreign administrator’s title to assets was recognized? That was the opposite of what he had understood regarding non-main proceedings; he thought that the effect of recognition was simply to give the foreign representative standing to request relief. It did not mean that his title to assets was recognized; that would mean giving substantive effects to the recognition of the foreign non-main proceeding.

15. Mr. GLOSBAND (Observer for the International Bar Association) said he thought it was implicit that no relief was granted automatically upon recognition, and that the foreign representative must make an application in order to obtain the right to take custody of assets. There would therefore be no difficulty in adding “at the request of the foreign representative” in paragraph (2), to make the intention clear.

16. On a subsidiary point, he drew attention to the definition of “foreign proceeding” in article 2(a), which included the requirement that the debtor’s assets must be subject to control or supervision by a foreign court. That limited the authority of the foreign representative.

17. Mr. TELL (France) said that article 17 as a whole was acceptable, but he was concerned that recognition of the foreign non-main proceeding could have substantial effects on local assets. He agreed that the meaning of “assets falling under the authority of the foreign representative” should be clarified, either in the text itself or in the Guide to Enactment.

18. Mr. GLOSBAND (Observer for the International Bar Association) said he thought that the purpose was to make it clear that any assets involved would be assets under the supervision of the foreign court in the non-main proceeding. In view of confusion over the meaning of “under the authority of the foreign representative”, it might be better to refer to the foreign non-main proceeding rather than the foreign representative. The words “falling under the authority of the foreign representative” could be replaced by the words “subject to the control or supervision of the foreign court in the foreign non-main proceeding”.

19. Mr. CALLAGHAN (United Kingdom) said that paragraph (2) could be expanded to make it clear that recognition did not
mean that the court would simply hand over the assets: recognition gave the foreign representative the right to ask for relief, but he would still have to prove title to the assets.

20. Mr. WESTBROOK (United States of America) agreed that the recognition of a foreign non-main proceeding merely permitted the foreign representative to ask the local court for various forms of relief. Very often, the relief contemplated in paragraph (2) might not be available, but the foreign representative could request it. That point could be made clear. All were agreed that it was up to the local court.

21. Mr. OLIVENCIA (Spain) thought that subparagraph (c) of paragraph (1) might be better placed before subparagraph (f) as the penultimate subparagraph. Subparagraph (d) again raised the question whether a reference should be made to national law with regard to the obtaining of evidence. In subparagraph (e), "administration and" should become "administration or".

22. The wording of paragraph (3) was not very satisfactory. It would be better to speak of assets "under the control or supervision of the foreign court". He agreed with the point made by the representative of Italy.

23. The drafting of the Spanish version of article 17 needed some attention.

24. Mr. BERENDS (Observer for the Netherlands) said that he had doubts about the suggestion to refer in paragraph (3) to assets "under the supervision of the foreign court". That would mean that the court would have supervision over assets in another country. In fact, the assets were not supervised by the court but by the foreign representative, who in turn was supervised by the court. Perhaps a wording such as "subject to that foreign non-main proceeding" would be better.

25. Mr. KOIDE (Japan) said that it was not clear how far the effects of the foreign non-main proceeding extended with regard to assets. That must be made clear.

26. Mr. MAZZONI (Italy) thought that the way to preserve the spirit of the model law in paragraph (3) would be to allow the local court to decide which assets in the enacting State could be turned over on the basis of how the enacting State determined bankruptcy. He therefore suggested that "assets falling under the authority of the foreign representative" should be replaced by "assets whose inclusion within the assets administered or supervised under the foreign proceeding is justified". The assets were not supervised under the foreign proceeding at the time when relief was requested, but would be if the relief was granted, and the court in the enacting State would decide if that was justified under local law.

27. Mr. WESTBROOK (United States of America) said he thought that that approach was consistent with his understanding, and represented a helpful step forward.

28. Mr. WIMMER (Germany) said that his delegation could accept paragraph (3) as it stood. However, an alternative might be to refer to assets that had been improperly removed from the foreign State, as suggested by the representative of Japan.

29. Mr. MAZZONI (Italy) thought that it would be dangerous to refer just to illegal transfers. The court of the enacting State would have to determine the assets whose handover would be justified.

30. Mr. SEKOLEC (International Trade Law Branch) said that, following informal discussions, it was suggested that the words "falling under the authority of the foreign representative" in paragraph (3) should be replaced by the words "that, under the law of this State, should be administered in the foreign non-main proceeding".

31. The CHAIRMAN said that, if he heard no objection, he would take it that article 17 was approved with that amendment.

32. It was so decided.

Article 18

33. Mr. SEKOLEC (International Trade Law Branch) said that article 18 dealt with the obligation to give notice of the fact that a foreign proceeding had been recognized, and the text in the first set of square brackets referred to the possibility of additional notice of the effects of that recognition. The notice was to be given in accordance with the procedural rules for notice in a comparable situation—namely, the opening of local insolvency proceedings in the enacting State. It would cover all incidental matters, such as the cost of giving notice.

34. It had been understood in the Working Group that, where there was an obligation to give notice, the fact that it might not yet have been given did not affect the automatic consequences of recognition under article 16. There had previously been an express provision to that effect in article 18, but it had been considered superfluous.

35. Ms. NIKANJAM (Islamic Republic of Iran) noted the bracketed words "the commencement of" within the second set of square brackets. She would prefer a general reference to the procedural rules under insolvency laws.

36. Mr. SANDOVAL (Chile) generally agreed with the article. However, there were different types of notice even within insolvency proceedings. The reference should be specifically to notice of the opening of insolvency proceedings.

37. Mr. AGARWAL (India) said it was not clear if one notice was to be given or two, one of recognition and one of effects. If only one notice was meant, the contents of the notice would have to mention the effects under article 16. He wondered what that meant: would the notice have to specify all the proceedings stayed under article 16(1)(a), for example? If it were left to the laws of the enacting State, the rules might differ, which would make it difficult to achieve uniformity.

38. Mr. CALLAGHAN (United Kingdom) was happy with the wording of article 18. The detailed contents should be left to the law of the enacting State.

39. Mr. HARMER (Observer for the International Association of Insolvency Practitioners), in response to the representative of India, said that uniformity was too much to hope for. Notice would be guided largely by the form of notice and the manner in which notice was given in each jurisdiction so that it could be most appropriate to the creditors and those affected in each jurisdiction. It would be best to keep the present wording.

40. Mr. KOIDE (Japan) shared the view of the representative of the Islamic Republic of Iran. Notice was required for the protection of local creditors; notice to the foreign creditors would be given by the foreign representative or the relevant court. Notice of recognition was different from notification of commencement of proceedings, dealt with in article 12. He proposed the deletion of the words "the commencement of".

41. Mr. ABASCAL (Mexico) said that it would be better to delete the reference to the commencement of a proceeding. That would correspond to the notice that would have to be given to the debtor when application was made for recognition.
of a foreign proceeding—something different from the notice referred to in article 18. The matter should be clarified in the Guide to Enactment.

42. Mr. MÖLLER (Finland) liked the article as it stood. It would not be possible to harmonize rules of notification. He would prefer the words "the commencement of" to be included. A general reference to procedural rules under insolvency laws might not be clear.

43. Mr. SHANG Ming (China) thought that the title of article 18, "Notice of recognition and relief granted upon recognition", should be aligned with the content.

44. The CHAIRMAN said that the drafting group would take care of that point.

45. Mr. WISITSORA-AT (Thailand) agreed that the means of notice could not be harmonized, and should be left to domestic law. However, notice of an application for recognition should also be required. Notice of application for recognition would give an opportunity to local creditors and those affected to challenge the application in court.

46. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said that that approach had been tried elsewhere, and had not worked. It was like giving the fox notice to get out of the hen house. Article 19 was there to protect local interests. He would strongly urge the Commission not to require notification of local parties before a hearing of the application for recognition. To do so would make the whole model law pointless.

47. Ms. MEAR (United Kingdom) agreed with the previous speaker. Such applications were by nature ones which should not have notice given of them before they were heard. They were by nature ex parte.

48. Mr. WISITSORA-AT (Thailand) noted that article 15 already allowed for urgent provisional measures. Ex parte applications for bankruptcy would be difficult for some countries to accept.

49. Mr. CHOUKRI SBAI (Observer for Morocco) supported article 18 as proposed. It was entirely in keeping with his country's procedure. The requirement for notice protected both local and foreign creditors.

50. Mr. MAZZONI (Italy) said that, for practical reasons, he could not support the proposal made by the representative of Thailand. However, he wished to remind delegations that in some countries, where bankruptcy involved constitutional principles, the "fox" would be heard before the court granted recognition.

51. Mr. TELL (France) was not much in favour of notification of the application, as that could compromise the main objective of the model law, which was the preservation of assets. In his country, in any case, there would be knowledge of an application.

52. Mr. WIMMER (Germany) thought that any unnecessary costs of proceedings should be avoided. In small bankruptcy cases, in his country, the most expensive item was notice. If there were only a few known creditors, perhaps they could be informed individually. The obligation to have full notification should not be created.

53. Mr. SHANG Ming (China) agreed with the representative of Thailand that notice should be given upon application. Article 15 provided for urgent provisional measures that would affect creditors. Under his country's law, there should be hearings, with the participation of the interested parties.

54. Mr. ABASCAL (Mexico) said that, in his country, as in Italy and probably other countries, it would not be possible to decide on recognition of a foreign proceeding without the application for recognition having been notified to the debtor. It was his understanding that the applicability of the provisions of articles 14 and 15 would be considered in an accelerated proceeding, prior to recognition.

55. Mr. GLOSBAND (Observer for the International Bar Association) suggested the inclusion in the Guide to Enactment of a statement to the effect that those countries whose laws would require notice of an application might wish to insert an appropriate provision.

56. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) stressed that there was no wish to deny anyone information. It should be borne in mind that the debtor would already have been declared bankrupt in at least one other jurisdiction. It was just that speed was essential, whether the aim was to rescue a business or to collect disappearing assets. If several days' notice were required, the law would be made much less powerful. As for giving notice to the debtor, the applicant would probably at that stage be the legal representative of the debtor.

57. Mr. TER (Singapore) said that in his country, even in ex parte proceedings, the court could not proceed with the hearing without notifying interested parties. He assumed that article 18 would not preclude normal notices.

58. Ms. LOIZIDOU (Observer for Cyprus) said that, under her country's law, notice to the debtor was required prior to recognition of the foreign proceeding.

59. Mr. DOYLE (Observer for Ireland) supported article 18 as drafted. He could not agree that notice of application should be given. That would be impracticable and probably unwise.

60. Mr. PUCCIO (Chile) supported the position of the representative of Thailand on the need to give notice of application. He could not imagine due process without such notice, both of the application and of subsequent recognition.

61. Mr. MÖLLER (Finland) said he would be strongly opposed to notice of application. There were precedents in Europe even for enforcement orders granted ex parte. Notice of recognition was, of course, essential. He would prefer article 18 as it stood.

62. Mr. HERRMANN (Secretary of the Commission) said that some delegations had drawn attention to constitutional requirements for notice. That would be one of the points considered in preparing the Guide to Enactment. He would be interested to know whether the reference was to general constitutional rules on due process or to rules that dealt expressly with the narrower context of application for recognition of foreign proceedings. In any case, if there was a constitutional requirement, perhaps a provision in the law was unnecessary.

63. Mr. ABASCAL (Mexico) said, in response to the Secretary's question, that in his country the authorities could not take action affecting rights without first having heard the person concerned. It was a matter of due legal process, and was set out in articles 14 and 16 of the Constitution.
46. Ms. LOIZIDOU (Observer for Cyprus) said that her country's Constitution included a general provision that, before a court issued a decision affecting the rights of a person, that person had the right to be heard in an open hearing.

47. Mr. MAZZONI (Italy) said that the principle of the right of defence was enshrined in his country's Constitution. It had been specifically ruled, in regard to bankruptcy, that no person could be pronounced bankrupt unless he was heard.

48. Mr. PUCCIO (Chile) said there was a general constitutional principle of due process in Chile, and a mechanism for appealing against acts violating that principle. It would be possible to appeal against a decision taken to recognize a foreign proceeding without those affected being notified.

49. Mr. CHOUKRI SBAI (Observer for Morocco) said that, in his country, there was as yet no law on cross-border insolvency, but the law on insolvency provided for notification.

50. Mr. AL-NASSER (Saudi Arabia) said that, in his country, although his country also did not yet have a cross-border insolvency law, there was a provision in domestic legislation that notification of the decision of the court must be published in the authorized journal for the publication of judicial notices as well as in the Official Gazette within eight days.

51. Mr. SHANG Ming (China) said that his country had no specific law on cross-border insolvency, but there was a State compensation law which provided that administrative bodies, courts, public security or police departments were liable to pay compensation in respect of damages caused. In the case of cross-border insolvency, article 15 could be applied, but it would be essential to give notice of the application, and such notice should be provided for in article 18.

52. Mr. WESTBROOK (United States of America) said that the concept of notice as part of due process was nearly universal. However, the method and timing of notice for different purposes varied greatly from one legal system to another. It had been recognized in the Working Group discussions that, in the case of application for recognition, the question of notice should not be covered in the model law and should be left to the constitutional principles and procedural rules of each country. Article 18 should be reserved for notice after recognition.

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Summary record of the 615th meeting

Friday, 16 May 1997, at 9.30 a.m.

[ACN.9/5R.615]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 9.40 a.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (continued) (ACN.9/435)

Article 18 (continued)

1. The CHAIRMAN said that the main issue that had emerged from the discussion so far was whether to leave article 18 basically as it stood or whether to expand the scope of the notice. He asked the representative of Thailand to repeat his proposed amendment to article 18.

2. Mr. WISITSORA-AT (Thailand) proposed that article 18 should begin: "Notice of application for recognition and notice of recognition of a foreign proceeding shall be given in accordance with ... ".

3. Mr. MÖLLER (Finland) was not in favour of the amendment, as it was a matter for each State. He saw no reason why other States should be obliged to require notice of application for recognition. They should be free to allow ex parte proceedings.
4. Mr. CHOUKRI SBAI (Observer for Morocco) thought that a requirement for notification prior to recognition was undesirable for two reasons: firstly because it would be expensive and secondly because the request for recognition might be rejected. He saw no need to amend article 18.

5. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) had problems with the suggested amendment; the only consequence would be to suggest to all nations that notice must be given before application. If the text said that notice of application was to be given in accordance with local laws where there was no local law the implication would be that notice must be given. Silence in the model law, on the other hand, would not preclude any nation from requiring such notice. The proposed provision did not say that the only notice was notice of recognition, but simply specified the practical minimum. He urged the Commission not to go further, as that would render the law useless.

6. Mr. WIMMER (Germany) said that he was opposed to the amendment because it would cause unnecessary costs. In any case, article 18 was not necessary for the goal being pursued in the drafting of the model law. He was confident that each country would adopt the provisions necessary to protect local creditors. He suggested deleting article 18, or wording it so as to leave the matter to the discretion of the court.

7. Mr. PUCCIO (Chile) fully agreed with the representative of Germany. Notice would anyway have to be given in accordance with the enacting State's rules. The best solution would be to delete article 18.

8. Mr. TER (Singapore) agreed. If article 18 was retained, there should at least be an indication that the article did not preclude a State from making rules under its own laws.

9. Mr. SHANG Ming (China) agreed with the representative of Thailand that there should be notice of application. The goal of the model law was to increase transparency. He could agree to the deletion of the article if it was considered unnecessary, but any reference to notice should be comprehensive.

10. Ms. NIKANJAM (Islamic Republic of Iran) said that all legal systems required notice under their bankruptcy laws. That should not prevent a requirement for notice in the model law, which concerned cross-border insolvency. She was against deleting article 18. Perhaps wording should be added such as: "If the laws of the enacting State require notice prior to recognition, then that State is free to provide for that".

11. Ms. MEAR (United Kingdom) supported the deletion of article 18. The proposed text might imply that other types of notice were precluded, or that the enacting State had no discretion as to whether or not to provide for notice in such circumstances. Taking everything into consideration, she was very much of the view that article 18 was not necessary. It would be enough to indicate, perhaps in the Guide to Enactment, that each country might wish to consider what notice requirements should be laid down.

12. Mr. ABASCAL (Mexico) noted that the proposed article 18 was the only article in the Model Legislative Provisions that went into procedural matters. He agreed that it would be much better to debate the article, mentioning the point in the Guide to Enactment.

13. Mr. BERENDS (Observer for the Netherlands) also favoured deletion of article 18, and an explanation in the Guide to Enactment.

14. Mr. MAZZONI (Italy) thought that either article 18 should be deleted or the concerns of the representative of Thailand should be accommodated.

15. Ms. SABO (Observer for Canada) said that the proposed article 18 represented an attempt to balance competing interests, those of the foreign representative and those of the debtor and local creditors. The attempt had not been successful. Article 18 could be deleted on condition that the Guide to Enactment made it clear that the enacting State would need to consider procedural requirements for notice.

16. Mr. CARDOSO (Brazil) agreed that article 18 should be deleted and a note included in the Guide to Enactment.

17. Mr. NICOLAEVASILE (Observer for Romania) said that there were several possible solutions, but that he could not accept a requirement for notice prior to recognition of the foreign proceeding.

18. Mr. CHOUKRI SBAI (Observer for Morocco) thought that it would be best to maintain article 18 as it stood, while mentioning in the Guide to Enactment that each State had the right to adopt notice procedures in accordance with local law. Alternatively, there could be a general provision, in article 18 or elsewhere, that matters of notice were subject to the local laws of each country.

19. Mr. MOLLER (Finland) agreed with the observer for Canada that, if article 18 had not achieved its objective, the best solution would be to delete it.

20. The CHAIRMAN said that there seemed to be a consensus to delete article 18. In the Guide to Enactment, there would be an explanation to the effect that the procedures should be left to each jurisdiction.

21. It was so decided.

Article 19

22. Mr. SEKOLEC (International Trade Law Branch) said that article 19 dealt with ways in which the decision to recognize, and its discretionary and automatic consequences, might be attenuated or adapted to the circumstances of the case, especially the interests of creditors and other interested parties including the debtor. That was done in three ways. Paragraph (1) stressed that, in exercising its discretion in granting relief under articles 15 and 17, the court must bear in mind the interests of creditors and other interested parties including the debtor. The two versions in square brackets were in substance the same, but with a difference in emphasis, or perhaps in the burden of proof. Paragraph (2) was a reminder that, when the court granted relief under article 15 or article 17, it was free to adapt the relief or to attach conditions to it, depending on the circumstances of the case. Paragraph (3) established the principle that, after the relief had been granted under article 15 or article 17, the affected person might approach the court and request termination or modification of the relief. The text in square brackets would allow the person affected to request modification of the automatic consequences of article 16. In the Working Group, some had taken the view that the automatic consequences must not be modified by the court, but others had thought that it would be beneficial for the automatic consequences, also, to be subject to possible restriction once they entered into force.

23. Mr. MAZZONI (Italy) understood the reasons underlying article 19, but did not consider the wording acceptable, for many reasons. Firstly, to refer to the duty of the court to take account of the interests of the creditors and other interested...
persons was to state the obvious. Secondly, it should be made clear whether “creditors” meant “local creditors”, that would introduce a new concept which his delegation did not favour, but the text should be clear and the issue should be discussed. Thirdly, in general terms, it was not acceptable in some legal systems to give a court power to modify, at its discretion, principles stated in law. Discretion was only possible within the limits set out by law. If article 16(1) was a legal provision, it could not be left to the discretion of the judge to modify the effects of that legal provision.

24. It was unacceptable, in civil law systems, for the law to establish principles and then leave the court free to adapt those principles to the circumstances of the case. It would be better to take a similar approach to that proposed by the Australian delegation, in document A/CN.9/XXX/CRP.5, for a new article 6 bis; one could say that nothing in the law in question limited the powers of the courts to refuse, modify or terminate relief by virtue of any other provision. That would make it clear that articles 15 and 17 did not in any way create rigidity in the system of administration of reliefs under the enacting State’s law.

25. Mr. DOYLE (Observer for Ireland) generally supported article 19. However, there should be a specific reference to local creditors. He was also anxious that the specific reference to modifying stay or suspension under article 16 should be retained, because it was that reference which had solved his difficulties with article 16(1).

26. Ms. NIKANJAM (Islamic Republic of Iran) agreed with the representative of Italy. Article 19 added nothing that was not found elsewhere in the model law. Paragraph (3) was particularly confusing; was the idea that relief granted at the request of one person could be modified at the request of another person?

27. Mr. AGARWAL (India) supported article 19. It made no distinction between creditors. In paragraph (3), the reference to stay or suspension under article 16(1) should be kept. The court needed the power to remove the stay or suspension under article 16 in justified cases.

28. Mr. KOIDE (Japan) thought that paragraph (3) should cover not only modification or termination of relief but also recognition. There were no provisions in the model law regarding modification or termination of recognition. If, for example, the court found that the requirements under article 13 were not fulfilled, or there were public policy considerations, the court should be allowed to modify or terminate recognition. He therefore proposed that recognition should be covered in article 19(3).

29. Mr. BERENDS (Observer for the Netherlands) said that it was appropriate for article 19 not to distinguish between local and foreign creditors. The aim should be equal status. In any case, what was meant by local creditors? Multinational companies were local creditors wherever they had branches. He could accept the text as proposed. With regard to the versions in square brackets in paragraph (1), his preference was for the second alternative. In paragraph (3), he was in favour of including the reference to stay or suspension under article 16(1), because the debtor must have the possibility of asking the court to modify the effects of article 16. The words in square brackets at the end of paragraph (3) should be included.

30. Mr. TER (Singapore) supported article 19, and shared the views expressed by the representative of India and the observers for Ireland and the Netherlands. He preferred the second text in square brackets in paragraph 19(1). His main concern related to paragraph (3), as the wording in article 16 was very inflexible and it was important to have an escape route in article 19. He urged the retention in paragraph 19(3) of the reference to paragraph 16(1).

31. Mr. OLIVENCIA (Spain) agreed with the representative of Italy. The title of article 19 was inappropriate, because the whole model law was aimed at protecting the interests of creditors and others; the subject of article 19 was the possibility for the court to modify the effects of certain measures under articles 15 to 17. Regarding article 19(3) and the reference in square brackets to stay or suspension under article 16(1), there was an important difference between discretionary judicial measures under articles 15 and 17 and jus ad causas consequences of recognition under article 16. It was logical that a judge might, at his discretion, amend judicial measures, but legal consequences, such as stay or suspension under article 16, could not be subject to modification by a judge in civil law systems. That did not mean that they were immutable: article 16(2) made them subject to limitations applicable under local law. But that was sufficient; there was no need to change the system in article 19. For his country, broad judicial discretion would lead to legal uncertainty and unpredictability, contrary to the purposes of the model law. Clear legal provisions were needed. The reference in article 19(3) to stay or suspension under article 16(1) should therefore be deleted.

32. Mr. CHOUKRI SBAI (Morocco) supported what had been said by the representative of Italy. There should be a general wording requiring the court to consider the interests of all creditors, local and foreign. He welcomed paragraph (3) of article 19 because any person or entity must be able to request modification of relief granted. That would be at the discretion of the court. He also supported the inclusion of the reference to “stay or suspension”.

33. Mr. SHANG Ming (China) felt that article 19 could be accepted in the main. Articles 15 and 17 already offered many reliefs for foreign creditors. Article 19 restored the balance. It would not be detrimental to the interests of other creditors but would protect local creditors and other parties. In paragraph (1), the second of the alternatives in square brackets stated the principle more clearly. In paragraph (3), he agreed with those who had urged that all the material in square brackets should be retained.

34. Mr. ABASCAL (Mexico) agreed generally with article 19. However, paragraph (1) merely restated the fundamental principle that the interests of all parties concerned must be taken into account, a principle that was anyway applied in his country, and probably in many others, not only in insolvency cases but in all proceedings. That being so, the text could give rise to confusion. If it was retained, he would prefer the wording in the second set of square brackets.

35. Paragraph (2) would be a novelty for judges in his country, but he could accept it.

36. Paragraph (3) was important in his view, particularly in regard to article 16(4). It had been said that article 16(2) made the question of stay subject to local law. However, in his country, that might leave a gap. Under Mexican law, in the case of claims guaranteed by mortgages and similar claims, proceedings would not be stayed but execution would. In the case of disputes such as those regarding claims for damages for non-performance of contract, proceedings would be stayed and the claims would be consolidated before the insolvency judge. But in the case of arbitration proceedings, if the Model Provisions were in effect there would be a dilemma: either the proceedings would be indefinitely stayed, or the judge would take over
the case from the arbitrators: neither of those solutions were acceptable.

37. One possible solution would be to take advantage of article 16(2) to establish a special provision under domestic insolvency law whereby the stay would not affect arbitration proceedings. But that would be a very serious matter, because it implied that article 16(2) could always be used by an enacting State to evade the effects of article 16(1). It was for that reason that he had said, at the 61st meeting, that article 19(3) would enable him to accept article 16. It would make it possible, when a foreign proceeding was recognized, for the stay to be ordered and then for the other party in the arbitration to ask the judge, subject to the necessary guarantees to protect creditors, to allow the proceeding to continue. That was why paragraph (3) was so important. The square brackets around the references to stay and suspension under article 16(1) should be removed.

38. Mr. WESTBROOK (United States of America) said that it was not so much "local" creditors as smaller creditors that one would wish to protect. However, it was difficult to define either local or smaller creditors in a useful way. In theory, it was true that the reference to creditors in article 19(1) was rather tautological, but he thought that it emphasized to the courts of enacting States that the interests of all creditors must be considered. In paragraph (1), the second of the versions in square brackets seemed to be generally preferred, and was acceptable to him.

39. Secondly, it was important that modification or termination of relief pursuant to article 16 should be allowed by article 19(3). There was, it was true, a difference between a prior court order and a legal provision being modified, but the latter seemed justified in the present case. Article 16(1) was intended to provide quick and mandatory relief. When, in his home country, a debtor had been found to be in bankruptcy, the imposition of the kind of stay provided for would usually be proper. However, there might be unusual circumstances requiring a modification of the relief normally granted, or a change of circumstances making the relief no longer appropriate. Perhaps some wording could be found to make the sense clearer, but it would be difficult to specify all the possible circumstances that might arise, and it was important that each enacting State should feel that there was power to react to unusual or changing circumstances. The reference to article 16 should therefore be retained.

40. Mr. WIMMER (Germany) said that he had no problem with paragraph (1) as it stood, but would have difficulty if it gave an advantage to local creditors. The key goal was to strengthen equal treatment of creditors. Secondly, he would prefer more precise language in paragraph (3), to give the court an indication as to when relief was to be modified.

41. Mr. TELL (France) said that article 19 was generally acceptable. Civil law systems did give judges considerable latitude in interpreting laws, and the article seemed compatible with his country's law. On the other hand, the wording suggested by the representative of Italy did not seem satisfactory; it would give the court too much freedom.

42. In paragraph (1), he thought that the text in the second set of square brackets was more in line with the intended purpose. There was no need to refer to "local" creditors. He thought that the point being made in paragraph (1) was worth including, even if it might be considered self-evident.

43. Paragraph (2) was acceptable. In paragraph (3), the possibility for the local court to terminate the effects of recognition was compatible with his country's law. He agreed with the representative of Spain that a judge was bound by the law, but article 19(3), as he understood it, merely empowered the court, if circumstances changed, to modify or terminate the measures that resulted automatically from recognition under article 16. Article 19 was important and he would like to see the bracketed phrases in paragraph (3) retained.

44. Mr. AGARWAL (India) said that it would not be appropriate to distinguish between international and local creditors. The proposed provision gave equal rights to all creditors. Secondly, in article 19(1), he was in favour of the text in the second set of square brackets. Paragraph (2) was satisfactory. On paragraph (3), he supported the comments of the representatives of the United States of America and France. In changed or unusual circumstances, the court should have the power provided for in that paragraph, and the bracketed phrases should be retained. He shared the views of the representative of Mexico on the question of arbitration.

45. Mr. MÖLLER (Finland) said that article 19 was important, and satisfactory as it stood. In paragraph (1), he preferred the language in the second set of square brackets. He opposed any distinction between local and foreign creditors; all interests should be adequately protected. On paragraph (3), he shared the view of the representatives of the United States of America and France. The paragraph was important.

46. Ms. UNEL (Observer for Turkey) said that equal treatment of creditors was an important principle. She preferred the wording in the second set of square brackets in paragraph (1), but perhaps the text should refer to "all" creditors. She supported paragraph (3), because it was right that, after the automatic effects of recognition, other creditors should have the opportunity to seek modification of the measures if their interests were adversely affected. The square brackets should be removed.

47. Mr. MAZZONI (Italy) thought that a possibility would be to broaden the scope of article 16(2) to make it clear that, if the law of the enacting State permitted flexibility in respect of automatic stay, that flexibility should not be prejudiced. What he was strongly opposed to was a kind of uniform imposition of judicial flexibility, or discretion, in regard to the stay. Having said that, he wished to suggest the following wording for article 19, in the light of what he had said earlier: "Nothing in this law shall limit the power of the court to refuse, modify, subject to conditions or terminate the reliefs granted under article 15 or article 17 in pursuance of or in accordance with any other law of this State".

48. Ms. INGRAM (Australia) said that she was surprised at the philosophical objections expressed to the general thrust of article 19. It had originally been inserted to meet the concerns of those worried about the automatic effects of article 16 and the vast range of remedies under article 17. In that regard, the model law should show the way to jurisdictions and not leave it to local law to decide whether discretion should be exercised, which would be the effect of the representative of Italy's suggestions.

49. The reference in paragraph (1) of article 19 to taking into account the interests of creditors and others provided a useful framework in which the court could operate in granting modifications to any relief granted. "Creditors" should cover both local and foreign creditors. Paragraph (3) should refer to the automatic effects arising under article 16; it should be possible to modify the effects in the case of unusual or changed circumstances. Circumstances constantly changed in cross-border insolvency. There was a need for urgent measures, but they did not have to go on in perpetuity. If examples of grounds were
given in paragraph (3), care should be taken to make the list merely illustrative rather than restrictive. She also suggested that any modification of measures should be “upon the request of the foreign representative, or any person or entity affected”.

50. Mr. SANDOVAL (Chile) said that article 19 was useful, and that the text in the second set of square brackets in paragraph (1) should be retained. In paragraph (3), he shared the concern expressed regarding the power of the judge to modify or terminate measures. Although circumstances changed, it was not logical or acceptable for a judge to have the possibility to modify measures required by law.

51. Mr. SUTHERLAND-BROWN (Observer for Canada) shared the view that the reference in paragraph (1) should not distinguish between creditors. He supported the text in square brackets in paragraph (3) referring to article 16(1), for the reasons expressed. A further reason was that, under some reorganization rules, the debtor remained essentially in control of his property. For the reorganization to succeed, it was important for the debtor to be able to deal with his property in ways that might not be regarded as passing the “ordinary course of business” test.

The meeting rose at 12.30 p.m.

Summary record of the 616th meeting

Friday, 16 May 1997, at 2 p.m.

[ACYN.9/435; A/CN.9/XXX/CRP.3]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 2.10 p.m.

CROSS-BORDER INSOLVENCY:
DRAFT MODEL LEGISLATIVE PROVISIONS (continued)

Article 19 (continued)

1. Mr. DOYLE (Observer for Ireland) said that, as the majority seemed to be against making a distinction between local and other creditors, he would be happy to go along with the majority. He preferred the wording in the second set of square brackets in paragraph (1). On paragraph (3), his position was that, if there was automatic stay in article 16(1), there must be provision for suspension or termination of the stay in article 19(3).

2. Mr. NICOLAEVASILE (Romania) said that he was in agreement with the entire text of article 19 as it stood. However, the word “adequately” in paragraph (1) could perhaps be changed to “equally and adequately”.

3. Mr. WESTBROOK (United States of America) said that he thought it important that countries should be ready to accept new ideas. The model law as proposed would require significant changes in procedures and rules in the country, but he accepted the need to try to persuade the legislator.

4. Ms. NIKANJAM (Islamic Republic of Iran) wondered if the intended purpose of article 19, to protect creditors and other interested persons, would be covered by the suggestion made by the representative of Italy at the previous meeting.

5. Mr. BERENDS (Observer for the Netherlands) said that, for him, article 19 was a safeguard enabling him to accept article 16. It was essential to be able to modify or terminate the automatic effects of recognition flowing from article 16. It seemed to be being argued that the automatic effects of article 16 could not be modified by a court, but article 17 already, in a way, provided for those effects to be modified, in that they would be replaced by court decisions to grant relief.

6. Mr. MAZZONI (Italy) said his view was that a reference to the interests of creditors and other interested persons was superfluous and might be confusing. On the problem regarding judicial discretion in modifying the legal effects flowing from article 16(1), he wished to propose language that would take care also of the point raised at the previous meeting by the representative of Japan concerning the need to allow recognition itself to be terminated or modified if circumstances required. That point, and the question of the effects of article 16(1), would be covered in a separate paragraph reading:

“The effects referred to in article 16(1) as well as the recognition itself may be terminated or modified within the limits and under the conditions provided for by the law of this State.”

7. Mr. OLIVENCIA (Spain) said that his proposal had been to amend article 16(2) to make not only the scope of stay and suspension but also modification or termination of the legal effects of article 16(1) subject to national law; however, he had no problem with the proposal of the representative of Italy for article 19. As to the discretion of the judge, it could indeed be expanded in respect of the reliefs under articles 15 and 17, originally granted at the discretion of the judge. These should logically be susceptible to modification not just at the request of the parties but by the judge ex officio, and article 19 should be modified accordingly. It was automatic legal effects whose modification should be subject to national law. He also agreed with the Italian proposal to allow for recourse against the recognition itself. A court might revise its own decision; that was perfectly admissible.

8. Ms. UNEL (Observer for Turkey) recalled her proposal at the previous meeting that article 19(1) should refer to “all” creditors.

9. Mr. AGARWAL (India) said that he would be opposed to a reference to termination of recognition in article 19.

10. Mr. ABASCAL (Mexico) said that the Model Provisions provided for recognition of foreign proceedings and the effects of that recognition, but they did not indicate when recognition and its effects terminated. He suggested that termination should occur when the foreign judge who had opened the foreign proceeding took a decision to terminate it. There should be provisions in the model law similar to those for recognition to cover termination of recognition.
11. Mr. SHANG Ming (China) agreed with the views of the representatives of Mexico and Spain. He also proposed the insertion of "in recognizing a foreign proceeding," at the beginning of paragraph (1). In paragraph (2) there should likewise be a reference to recognition.

12. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) pointed out that, in the proposed preamble setting out the purpose of the law, the second point was greater legal certainty. There should be no question of revoking recognition. Once recognition had been decided on—leaving aside questions such as fraud in the application, which he had never heard of in practice—the court clearly needed to be able to consider the interests of all parties and to modify any relief as appropriate. He could not think of many jurisdictions where that was not currently the case. Mere inconsistency with current national law was not an issue and constitutional issues would naturally be borne in mind by nations enacting the provisions.

13. Mr. TELL (France) supported the view that it was the provision in article 19 allowing modification of the effects of article 16 that made the latter article acceptable. With regard to the new wording just proposed by the Italian delegation, he would be opposed to a reference to terminating "the recognition itself". A court could hardly decide to revoke a recognition that it had granted. The purpose in article 19(3) was to allow modification or termination, not of the recognition, but of the automatic effects of recognition under article 16.

14. The CHAIRMAN suggested that discussion of article 19 should be adjourned until the following meeting to allow for consultations.

15. It was so decided.

Organization of work

16. After a procedural discussion in which Ms. MEAR (United Kingdom), Mr. COOPER (Observer for the International Association of Insolvency Practitioners), Ms. SABO (Observer for Canada), Mr. MAZZONI (Italy), Ms. BRELLIER (France), Mr. OLIVENCIA (Spain), Mr. WESTBROOK (United States of America) and Mr. CALLAGHAN (United Kingdom) took part, the CHAIRMAN proposed that article 19 bis should be taken up after the other articles and that article 22 should be taken up next.

17. It was so decided.

Article 22

18. Mr. SEKOLEC (International Trade Law Branch) said that two mistakes in document A/CN.9/XXX/CRP.3 needed to be corrected. In new paragraph (3)(a), "article 15" should read "article 13". In the English version of paragraph (3)(b), "consistent" should read "inconsistent".

19. Ms. INGRAM (Australia), speaking on behalf of the delegations of Australia, Canada, Germany, the Islamic Republic of Iran, the Netherlands, the International Association of Insolvency Practitioners and the International Bar Association, introduced the proposal in document A/CN.9/XXX/CRP.3 for two new paragraphs, (3) and (4), to be added to article 22. They represented an attempt to deal systematically with the issue of concurrent proceedings. A number of principles had been discussed at the last session of the Working Group, and the proposed text sought to take account of those discussions and the issues raised in connection with articles 14, 15, 16 and 17, in particular. They might also address concerns expressed during the current session, especially by the representative of Italy.

20. In new paragraph (3), the overall principle in the chapeau was that the court should aim at cooperation and coordination. The succeeding subparagraphs indicated the hierarchy to apply in concurrent proceedings. Subparagraph (a) dealt with a situation where a local proceeding was already in existence. There were no automatic effects, and the court must be certain when granting relief that it was consistent with the conduct of the local proceeding. The local proceeding took precedence.

21. Subparagraph (b) concerned a local proceeding that commenced after recognition of the foreign proceeding. The court was required to review any relief granted under articles 15, 16 or 17 and must modify or terminate such relief if necessary.

22. Subparagraph (c) dealt with a concern raised under articles 16 and 17. It provided that the court, in granting or modifying relief granted to a foreign representative of a non-main proceeding, must be satisfied that the relief related to assets falling under the authority of the foreign representative or concerned information required in the foreign proceeding.

23. New paragraph (4) established the hierarchy in the case of multiple foreign proceedings. The chapeau sought to ensure cooperation and coordination of worldwide insolvency proceedings. Under subparagraph (a), where there had been recognition of a foreign main proceeding, relief in the case of a subsequent proceeding must be consistent, which meant that the foreign main proceeding took precedence. Under subparagraph (b), if a foreign main proceeding was recognized following an application for recognition of a foreign non-main proceeding, the court must review relief granted under articles 15 or 17 and terminate or modify the relief where necessary. Under subparagraph (c), the court had flexibility to grant, modify or terminate relief where two foreign non-main proceedings were recognized.

24. Mr. GLOSSEND (Observer for the International Bar Association) said that the phrase "falling under the authority of the foreign representative" should be brought in line with the decision taken on article 17, and be replaced by the words "that, under the law of this State, should be administered in the foreign non-main proceeding".

25. Mr. WESTBROOK (United States of America) said that he supported the two new paragraphs proposed, which were consistent with the principles that had been discussed and had received widespread support in the Working Group. Paragraph (3) applied where there was a local proceeding. Whatever the theorist might say, the reality was that local proceedings would be opened by local creditors, and would receive particular attention in the enacting State. Recognizing that reality, paragraph (3) provided that any relief granted to a foreign proceeding must take into account the local proceeding, and the local administrator and creditors involved in that proceeding. He welcomed the principle that the local court had an obligation to give consideration to cooperation and coordination in every case.

26. Paragraph (4) covered the situation where there were two foreign proceedings, but no local proceedings. The concern was to establish a proper precedence. He strongly supported that approach that a first step towards the universality of insolvency.

27. Mr. OLIVENCIA (Spain) commended the efforts made by the sponsors to resolve the important and difficult problem of concurrent proceedings. However, as far as terminology was concerned, he noted that no distinction was made between discretionary reliefs under articles 15 and 17 and legal effects of recognition under article 16.
28. As to the application of the agreed principles, the proposal was very constructive and generally acceptable, but incomplete. All situations should be contemplated. He saw no reference to the problem of what happened when a local main proceeding was opened subsequent to recognition of a foreign proceeding.

29. Mr. GLOSĐAND (Observer for the International Bar Association) said that paragraph (3) concerned the relationship between a foreign proceeding of any type and a local proceeding of any type, and he felt that the concern of the representative of Spain was addressed by paragraph (3)(b).

30. Mr. FRIMAN (Observer for Sweden) supported the ideas behind the proposed new paragraphs, which were consistent with the principles agreed in the Working Group.

31. Mr. Mazzoni (Italy) said that in general the proposed paragraphs reflected the objectives agreed on. However, in the light of paragraph (1) as proposed by the Working Group (A/CN.9/435, annex), thought must be given to what would happen if, after the recognition of a foreign main proceeding, the requirements under local law for the opening of a local main proceeding were found to be met. It seemed that the proposed solution was judicial discretion in coordinating the two proceedings. He submitted that the problem could not be solved by court discretion alone. In some countries, it would be necessary to revoke or modify the effects under article 16 in accordance with local procedural rules. That was what he had proposed in respect of article 19.

32. Mr. Callaghan (United Kingdom) said that, in paragraph 22(1), “assets” presumably meant only assets existing as at the date of recognition. If they had all been transferred, there would be no jurisdiction to open proceedings. Secondly, with regard to article 22(3)(a), the foreign proceeding referred to might presumably be a non-main proceeding. Thirdly, the new wording proposed for article 22 would presumably mean that article 16(5), appearing in square brackets in the Working Group’s text, would be deleted.

33. Mr. Westbrook (United States of America) said that he read paragraph (3)(a) as applying to main and non-main foreign proceedings. It enshrined the conclusion of the Working Group that a local proceeding should take precedence over a foreign main proceeding, in the sense that the local court could decide. That was not his preferred solution, but he could accept it.

34. Secondly, the representative of the United Kingdom was quite right that the content of article 16(5) should be considered covered in the proposed article 22.

35. Finally, the situation where a foreign proceeding was recognized as a main proceeding, and later a main proceeding was opened locally, should be considered. The Working Group had agreed on the principle (A/CN.9/435, para. 180) that there could only be one main proceeding. The local court would decide which was the main proceeding. In the example given by the representative of Italy, the court would presumably have found its earlier decision to be in error, the foreign proceeding not being in the country of the debtor’s main interest. What should then be done? His first reaction would be to leave such problems to local law. It might be difficult to draft a sufficiently general provision. Perhaps there could be a note in the Guide to Enactment.

36. Mr. Sutherland-Brown (Observer for Canada) thought that perhaps article 22(1) had been drafted too narrowly in limiting the effects of the proceeding at issue to the assets of the debtor situated in the territory of the enacting State. A debtor in country A might have an operating division in country B, with a plant back in country A. It would be unfortunate to prevent the operating division from being sold as a unity. He suggested the addition at the end of the paragraph of a reference to such other property as might be appropriately administered.

37. Mr. Cooper (Observer for the International Association of Insolvency Practitioners) said that there were sometimes “main proceedings” in more than one country, because of the view taken by courts in different countries. That should not interfere with article 22. The model law should not try to solve such issues, which came in the province of conflicts of law.

38. Mr. Tell (France) expressed appreciation for the proposal in document A/CN.9/XX/CRP.3.

39. Regarding paragraph (2) in the Working Group’s text (A/CN.9/435, annex), he noted that that paragraph made recognition of a foreign proceeding proof that the debtor was insolvent for the purposes of commencing a local proceeding. That could perhaps be accepted if it were limited to foreign main proceedings.

40. Paragraph (3) did not seem to distinguish between main proceedings and others. Paragraph (3)(a) presumably referred to foreign main proceedings, since there was a reference to article 16. He wondered how paragraph (3) related to paragraph (1). The proposal did not clearly reflect the principle that there could be only one main proceeding. Finally, with regard to the principle in article 16(5), he wondered whether that was clearly covered in the proposed draft.

41. Mr. Mazzoni (Italy) said that the representative of the United States of America had questioned whether a general rule could be drafted to enable a court to correct mistakes. The solution might be found in his delegation’s proposal for a provision in article 19 allowing the effects referred to in article 16(1) to be terminated or modified as provided for by the law of the enacting State. Judicial discretion was not the answer. If it was considered acceptable to refer to local law in article 16, could it not be clearly stated that rectification of mistakes was subject to local law?

42. As had been pointed out, a conflict might arise, not because of a mistake, but because of differing grounds for determining the requisites for a main proceeding, for example. Such a conflict could not be solved by judicial discretion but only on the basis of the system of civil procedure in the enacting State.

43. Ms. Mear (United Kingdom) said that she regarded as unfortunate the view of the Working Group that local proceedings should take precedence, but she would not reopen the question. With regard to competing main proceedings, it would be simplistic to assume that there would be only one such proceeding. To determine which of two or more proceedings were main proceedings would be very difficult, and she was not in favour of dealing with that issue in the model law.

44. Mr. Wimmer (Germany) supported the comments of the representatives of the United Kingdom and the United States. The goal of the model law was to draft model provisions which covered most cases. It would not succeed if it tried to cover all issues. It should stick to the simple principle that there was only one main proceeding. Matters concerning appeals or rectification of error should be left to local procedural law. The text before the Commission represented a good approach.
45. Mr. BERENDS (Observer for the Netherlands), referring to the comments of the representative of France on paragraph (3)(a), suggested that that paragraph should read: "If the proceeding ... is taking place at the time the application ... is filed, any relief under articles 15 or 17 must be consistent with the conduct of the proceeding under [identify laws of the enacting State relating to insolvency] and, when the foreign proceeding is a foreign main proceeding, article 16 does not apply."

46. With regard to the principle that there could only be one main proceeding, what was really meant was that each court could only recognize one proceeding as a main proceeding.

47. Lastly, in paragraph (1), the requirement that the debtor should have assets in the enacting State was an insufficient restriction; it would be better to say that the debtor must have an establishment in the State.

48. Ms. INGRAM (Australia) agreed that paragraph (3)(a) should say specifically that, in the case of a foreign main proceeding, article 16 did not apply. The issue of multiple main proceedings was an academic problem. The model law concerned the enacting State's position, and that State must recognize only one main proceeding. It would only be a problem in the case of error or if new facts came to light. But by that time, the case would be before the court, and the court would decide what effects there should be.

Summary record of the 617th meeting

Tuesday, 20 May 1997, at 9.30 a.m.

[A/CN.9/SR.617]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 9.40 a.m.

CROSS-BORDER INSOLVENCY:
DRAFT MODEL LEGISLATIVE PROVISIONS (continued) (A/CN.9/435; A/CN 9/XXX/CRP.3, CRP.7)

Article 19 (continued)

1. The CHAIRMAN said that, during the discussions so far on article 19, the general view had been that no distinction should be drawn between local and foreign creditors. There seemed to be agreement emerging that paragraph (1) was generally acceptable, and that the wording in the second set of square brackets should be retained. There had been little disagreement on paragraph (2). Paragraph (3) continued to cause difficulties.

2. Mr. OLIVENCIA (Spain) said that he had expressed the view at the 615th meeting that the automatic effects of recognition of the foreign main proceeding under article 16 should not be subject to the same treatment as the discretionary reliefs referred to in articles 15 and 17. As a compromise solution, he wished to propose an amendment to article 16(2). The first part of that paragraph would be amended to read: "The scope, modification and termination of the effects referred to in paragraph (1) of this article are subject to ...".

3. That would make the modification or termination in question subject to national law. If national law provided for court discretion in such cases, that would apply, but the difference between automatic effects and discretionary reliefs would be respected. As a result of that amendment, the phrases in the first two sets of square brackets in article 19(3), referring to stay or suspension pursuant to article 16(1), could be deleted.

4. Mr. WIMMER (Germany) said that he could go along with the approach proposed by the representative of Spain. He also proposed that paragraph 19(3) should include a reference to the foreign representative, because he doubted if "person or entity affected by relief" would include the foreign representative. The paragraph would start "Upon request of a foreign representative or a person...".

5. Ms. SABO (Observer for Canada) supported the proposal made by the representative of Germany, otherwise she supported the article as drafted, including all the text in square brackets, but the representative of Spain's proposal also deserved consideration.

6. Mr. CHOUKRI SBAI (Observer for Morocco) said he would like a clearer reference to protection of local creditors. He supported the proposal of the representative of Spain. As to the proposal of the representative of Germany, he could not imagine that the foreign representative would be adversely affected by relief. He was the one who asked for the relief in the first place. He understood article 19(3) to refer to third parties adversely affected by the relief who would have a right to intervene.

7. Mr. MAZZONI (Italy) said he supported the proposal of the representative of Spain, and would, if it were accepted, withdraw his own proposal. He agreed that article 19(3) could be broadened to include a reference to the foreign representative. He also thought that the court, ex officio, should be able to modify the relief granted under articles 15 or 17.

8. As far as the references to stay and suspension in article 19(3) were concerned, he would suggest that, in addition to the proposal of the representative of Spain for article 16(2), the words "and subject to the other applicable provisions of the law of this State" should be added at the end of article 19(3).

9. Mr. MOLLER (Finland) supported the proposal to include a reference to the foreign representative. The proposal by the representative of Spain, with the addition suggested by the representative of Italy, could also be accepted as a compromise, though he slightly preferred the present text. He had no objection to allowing judges to make ex officio decisions, though he thought it unlikely that they would do so in practice.

10. Mr. WESTBROOK (United States of America) said that the proposal of the representative of Spain removed an obsta-
He therefore suggested that the Guide to Enactment as creating a judicial proceeding in which relief could be sought. When that had been accomplished, the proceeding should indicate that, when there was no longer a need for the recognition proceeding, the court could terminate the proceeding under normal rules.

Mr. ABASCAL (Mexico) said that the issue of modification or termination of recognition raised various problems which should at least be discussed in the report. The decision of any judge was, in principle, subject to appeal. As he interpreted the model law, an appeal against an order of a judge granting recognition would concern whether the requirements of articles 13 and 14 had been met. In that connection, he wished to point out that, under Mexican insolvency law, a proceeding for the declaration of a bankruptcy was a summary, accelerated procedure, requiring only the minimum evidence necessary to show the need for the declaration. If a party appealed, the appeal court could review the merits of the case in its entirety. To avoid misunderstandings, the Guide to Enactment should make it clear that an appeal against recognition would be limited to the question whether there had been a violation of the provisions of articles 13 and 14.

That left open the problem of termination of recognition of the foreign proceeding. On that point, he still considered, as he had said at the previous meeting, that there should be a system for terminating recognition if the foreign proceeding was terminated.

Ms. MEAR (United Kingdom) said that, after listening to the various comments, she would be very much in favour of dealing with the issue of termination of recognition in the Guide to Enactment.

Mr. SEKOLEC (International Trade Law Branch) said that article 16(2) would be worded along the following lines:

The scope, modification or termination of effects referred to in paragraph (1) of this article are subject to [refer to the rules of law of the enacting State relating to insolvency that govern the exceptions, limitations, modifications and termination of effects referred to in paragraph (1) of this article].
30. In article 19(3), the text in the first two sets of square brackets would be deleted.

31. The proposal of the representative of Germany was that article 19(3) should begin: “At the request of the foreign representative or a person or entity ...”.

32. Mr. MAZZONI (Italy) pointed out that several delegations had spoken in favour of a reference to the possibility of modification of relief by the court ex officio.

33. The CHAIRMAN agreed that there had been no strong objection to that proposal.

34. Mr. CHOUKRI SBAI (Observer for Morocco), referring to the proposal of the representative of Germany, said that he had no strong objection to the idea. It was natural that the foreign representative would present a request for the termination of relief. However, a request for modification of relief, without further definition, could give rise to problems.

35. The CHAIRMAN said he took it that the German proposal and the proposal to introduce language to allow the court to act ex officio were accepted. He would ask the Secretariat to read out the amended text.

36. Mr. SEKOLEC (International Trade Law Branch) said that article 19(3) would begin along the following lines: “Upon request of the foreign representative or a person or entity affected by relief granted under article 15 or 17, or at its own motion, the court ...”.

Article 22 (continued)

37. The CHAIRMAN suggested that the Commission should consider the original draft for article 22 contained in the annex to document A/CN.9/435 together with the proposed new paragraphs (3) and (4) introduced at the previous meeting (A/CN.9/XXX/CRP.3). In addition, he drew attention to the new paragraph (5) for the article proposed in document A/CN.9/XXX/CRP.7.

38. Ms. NIKANJAM (Islamic Republic of Iran) suggested replacing the words “consistent with the conduct of” in new paragraph (3)(a) in document A/CN.9/XXX/CRP.3 with wording such as “in accordance with”.

39. Mr. GLOSBAND (Observer for the International Bar Association) thought that, rather than saying in the chapeau to paragraph (3) that the court should seek to achieve cooperation and coordination “subject to the following”, it would be better to say that “the following provisions shall apply”.

40. He also supported the suggestion made by the observer for the Netherlands at the previous meeting for an amendment to paragraph (3)(a) to say that article 16 did not apply when the foreign proceeding was a main proceeding.

41. Mr. TELL (France) recalled what he had said regarding paragraph (2) of article 22 in the Working Group’s text (A/CN.9/435, annex). The text should specify that the proceeding in question must be a main proceeding. He also supported the suggestions made by the representative of the Islamic Republic of Iran and the observer for IBA.

42. Mr. SUTHERLAND-BROWN (Observer for Canada) recalled what he had said regarding paragraph (1). While the possibility of opening local proceedings could properly be made dependent on the presence of assets in the enacting State, the effects of the proceeding should not be limited to such assets. He suggested the addition of “and such other property as may be appropriately administered within the proceeding in this State”.

43. He supported article 22(3) with the changes proposed by other delegations. On a drafting point, paragraphs (3)(c) and (4)(a) should perhaps refer to the “foreign representative”, not just the “representative”.

44. Mr. OLIVENCIA (Spain) recalled his earlier comments regarding the proposed paragraphs (2) and (3). Paragraph (1) in document A/CN.9/435 dealt with one possible combination of factors: the opening of a local proceeding after recognition of a foreign main proceeding. To be systematic, the new paragraph (3) should be placed after paragraph (1), and paragraph (2) in document A/CN.9/435 should be placed at the end of the article. The proposed presumption of insolvency was a separate question, and one on which he had reservations that he would not discuss for the moment.

45. He noted that paragraph (3), subparagraphs (a) and (b), did not distinguish main and non-main proceedings. In any event, it seemed to him logical that, if a local proceeding was already taking place when an application for recognition of a foreign proceeding was filed, the assets of the debtor located in the enacting State would already be under the supervision of the local court dealing with the insolvency, in which case not only should article 16 not apply but no relief could be granted under articles 15 or 17 affecting the assets. For example, to entrust the foreign representative with the administration of local assets would be incompatible with the existing local proceeding. The effects of recognition would relate to coordination and information, not to reliefs under articles 15 or 17.

That was particularly clear if the local proceeding was a “main proceeding". Indeed, in his view, the hierarchical factor should then take precedence over the chronological factor, and the opening of a local main proceeding should always preclude the granting of relief affecting the debtor’s assets in the enacting State. That would be in line with the logic of the rest of article 22.

46. Mr. MARKUS (Observer for Switzerland) supported the proposal of the representative of France that the presumption of insolvency under paragraph (2) should be limited to foreign main proceedings.

47. Mr. ABASCAL (Mexico) said that he would like to see paragraph (2) deleted. It would introduce a new criterion for opening insolvency proceedings, and reverse the burden of proof of insolvency. The rule that it embodied was not properly within the province of the model law.

48. Ms. MEAR (United Kingdom) agreed with the suggestion that recognition of a foreign main proceeding should be necessary for the presumption of insolvency under paragraph (2).

49. Mr. WIMMER (Germany) also agreed. The provision should not be deleted.

50. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) endorsed the suggestion of the observer for Canada for paragraph (1). Quite frequently assets were administered from a jurisdiction other than that of the main proceeding. There were ways in which courts and practitioners operated, through "protocols" approved by courts, that would be made unworkable if the present wording were retained.

51. It would be a pity to restrict paragraph (2) to main proceedings: the presumption of insolvency would be rebuttable, and there would be many occasions when the provision would be useful as currently drafted.
52. On the point raised by the representative of Spain, even if local proceedings had commenced the courts might want to assist the foreign representative in his task. That assistance might take many forms, and should not be precluded. As the relief under articles 15 and 17 was discretionary, it would not pose a threat to local proceedings which had already been opened.

53. Mr. BERENDS (Observer for the Netherlands) said that the reference to “other property” in the wording suggested by the Canadian delegation for paragraph (1) was unclear; how could property other than the debtor’s be administered? Secondly, paragraph (1) in document A/CN.9/435 contained a supposed restriction on the opening of a local proceeding based on assets. He did not see how that was a restriction; if there were no assets, there would be no reason to open a local proceeding. He suggested saying that a local proceeding could only be opened if the debtor had an establishment in the State, giving “assets” as an alternative in square brackets.

54. He supported the proposal of the representative of France for paragraph (2).

55. Mr. MÖLLER (Finland) said the issue raised by the observer for the Netherlands regarding “assets” had been thoroughly aired in the Working Group. He was happy with the text as drafted. As to the additional wording suggested by Canada for paragraph (1), he would prefer to have no addition unless he could be given examples to show the need for it.

56. He supported the proposal to restrict the presumption of insolvency under paragraph (2) to main proceedings. That would not mean that a non-main proceeding had no evidentiary value.

57. Mr. SUTHERLAND-BROWN (Observer for Canada) gave as an example the case of a United States corporation with an operating division in Canada. The operating division had manufactured soft drinks at several plants, two or three of which had been physically located in Canada and two in the United States. Both the foreign representative and the trustee in Canada wished to sell the operating division as a going concern. Had the trustee in Canada not been able to treat the division as a single going concern, comprising both the United States plants and the Canadian plants, less value would have been received for it. It had been to everyone’s advantage that it be sold through the Canadian proceeding, and that had been done. Under the rule in paragraph (1), it would not have been possible. The assets in the United States would have had to be sold separately under a proceeding in that country.

58. With regard to the opening of a local proceeding, he supported the present limitation, but that limitation did not mean that the effects of the proceeding had to be limited in the same way.

59. Mr. WESTBROOK (United States of America) said that he was generally happy with article 22, with the suggested changes that seemed to have been accepted by consensus. The representative of Spain was probably right that paragraph (2) should be moved to the end. He agreed with the proposal of the representative of France. However, he did not agree with the representative of Spain on the need for substantial modification of the provisions in the proposed paragraphs (3) and (4) (A/CN.9/XXX/CRP.3). The possibility of relief under articles 15 and 17 should not be eliminated because of a local proceeding. He accepted that the local proceeding had a certain dominance once it was opened, but there should be room for relief granted to the foreign representative if compatible with the local proceeding. For example, there might be complete distribution in the local proceeding, leaving a surplus that could go to the foreign representative.

60. Regarding the suggestion of the observer for Canada, on the whole he preferred the article as currently drafted. The example cited would be covered by article 21, concerning cooperation and coordination between proceedings.

61. Mr. WISITSORA-AT (Thailand) agreed with the observer for Canada about paragraph (1). He found it difficult to accept, however, the suggestion that, in paragraph (2), the presumption of insolvency should be limited to a foreign main proceeding. As had been said, the presumption was rebuttable. If a company had a branch abroad and that branch went bankrupt, there could be a presumption that the parent company was in trouble. He would like paragraph (2) to remain as drafted.

62. Mr. AL-NASSER (Saudi Arabia) said that paragraph (2) should not be deleted, but it could be made clearer. It was important that the document accompanying the request for recognition of a foreign proceeding should provide evidence that the debtor’s insolvency had been established.

The meeting rose at 12.30 p.m.

Summary record of the 618th meeting

20 May 1997, at 2 p.m.

[A/CN.9/SR.618]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 2.10 p.m.

CROSS-BORDER INSOLVENCY:
DRAFT MODEL LEGISLATIVE PROVISIONS (continued)
(A/CN.9/435; A/CN.9/XXX/CRP.3, CRP.7)

Article 22 (continued)

1. The CHAIRMAN said that a number of issues had been raised at the two preceding meetings regarding article 22, and particularly regarding paragraphs (1) and (2).

2. Ms. SABO (Observer for Canada) said that her delegation’s proposal for additional language in paragraph (1) seemed to have attracted little support, and she could accept the views of other delegations in that regard.

3. The drafting group could perhaps consider the possibility of splitting article 22 into several articles.

4. Mr. ABASCAL (Mexico) withdrew his proposal to delete paragraph (2), and supported the proposal of the representative...
5. Mr. CALLAGHAN (United Kingdom), referring to the addition proposed by the Canadian delegation to paragraph (1), agreed that it was essential for an insolvency representative to be able to sell a business as a going concern, even if the assets were in more than one State. Perhaps that point was satisfactorily covered by article 21; however, having listened to the comments of the Canadian delegation and the observer for INSOL, he thought that it would be useful for article 22(1) to be clarified in the way proposed.

6. Mr. GLOSBAND (Observer for the International Bar Association) disagreed. Paragraph (1) of article 22 dealt with limitations on local proceedings, while article 17(3), as it had been amended at the 614th meeting, did give powers of the kind in question to the representative of a foreign non-main proceeding if it was appropriate that his proceeding should encompass additional assets beyond the local assets. Those two concepts should not be confused. The scope of the local proceeding under article 22 should not be expanded.

7. Mr. MARKUS (Observer for Switzerland) said that he had some sympathy for the view that article 22(1) might be too restrictive. He drew attention to the proposed paragraph (3)(c) (A/CN.9/XXX/CRP.3), dealing with the inverse situation: a foreign non-main proceeding concurrent with a local main proceeding. In that case, the restriction did not go so far. Some States might have difficulty in accepting a limitation on local non-main proceedings in paragraph (1) that exceeded that imposed on a foreign non-main proceeding in paragraph (3). He therefore proposed that the last part of paragraph (1), after the wording in square brackets, should be replaced by the words "only as a non-main proceeding". That would attenuate the limitation.

8. Ms. LOIZIDOU (Observer for Cyprus) said that she had a problem with the expression "the courts of this State have jurisdiction to commence a proceeding" in paragraph (1). It was interested parties that commenced proceedings, not courts. Secondly, she agreed with the addition proposed by the Canadian delegation. Thirdly, she had difficulty with paragraph (2), because as it was drafted a debtor would be presumed to be insolvent even though he might not have been found insolvent in the foreign State. In that case, the presumption would be unfair.

9. Mr. CHOUKRI SBAI (Observer for Morocco) said that he favoured the use of the term "assets" in paragraph (1) rather than the term "establishment". Secondly, the text of paragraph (1) was very clear and the reference to "other property" proposed by the Canadian delegation was unnecessary.

10. He supported the proposal of the representative of France that paragraph (2) should refer to main proceedings.

11. Mr. MAZZONI (Italy) thought that it would be a good idea to have a chapter on concurrent proceedings consisting of several articles, as had been suggested.

12. Secondly, he supported the addition proposed by the Canadian delegation, for the reasons expressed by the observer for Switzerland. He would prefer the language proposed by the latter, but in any case the wording of paragraph (1) should be modified so as to take care of the point. To take into account the comments of the observer for Cyprus, the wording "a proceeding may be commenced" could be used. There should also be a reference to the possibility of a local proceeding entering into conflict with a foreign main proceeding previously recognized.

13. Regarding paragraph (2), he supported the proposal of the representative of France; the paragraph should begin: "Recognition of a foreign main proceeding".

14. Concerning paragraph (3)(a), he supported the suggestion to say that article 16 did not apply if the foreign proceeding was a main proceeding. He also supported the suggestion to use wording such as "consistent with the proceeding" or "in accordance with the proceeding", without the word "conduct".

15. He agreed with the observer for IBA that the phrase "falling under the authority of" in paragraph (3)(c) should be aligned with the decision taken on article 17.

16. Lastly, he supported the new paragraph (5) proposed in document A/CN.9/XXX/CRP.7.

17. Mr. BERENDS (Observer for the Netherlands) said that he saw very little support for his proposal that article 22(1) should refer to an "establishment" of the debtor. However, his question as to how the provision constituted a restriction on the opening of a local proceeding in paragraph (1) had not been answered.

18. Secondly, he had much sympathy with the proposal of the observer for Switzerland to say that a local proceeding could only be a non-main proceeding once a foreign main proceeding had been recognized. However, there would need to be a definition of a non-main proceeding.

19. Mr. SEKOLEC (International Trade Law Branch) said that the question just raised had been discussed in the Working Group, and it had been recognized that there might not be much of a restriction, but it had also been said that the provisions made a distinction, at least, should be present, and insolvency proceedings could not be opened just for the benefit of creditors in the absence of assets.

20. Mr. SHANG Ming (China) supported the addition to paragraph (1) proposed by the Canadian delegation. He would have supported the proposal, which had been withdrawn, for the deletion of paragraph (2). The provision in that paragraph was related to article 16, concerning the effects of recognition. He wondered how it related to other parts of the text, and would welcome clarification from the Secretariat.

21. Mr. SEKOLEC (International Trade Law Branch) thought that the purpose of paragraph (2) was to avoid the need to prove what had already been established abroad. There had already been an insolvency proceeding opened, and the provision gave credit to the grounds which had served for the opening of that foreign proceeding. The aim was to facilitate the opening of insolvency proceedings in the enacting State.

22. Mr. WESTBROOK (United States of America) said he hoped that the lack of discussion of the proposed new article (5) (A/CN.9/XXX/CRP.7) was indicative of general support. He strongly supported it, since it was essential that courts should have full information when acting with respect to a foreign proceeding.

23. He thought that the proposal originally made by the Canadian delegation highlighted the need for coordination among proceedings. Presumably no one wanted the representative in a local non-main proceeding to compete with representatives in other countries; in that case, the concern related to coordination. He suggested that the words "to the extent necessary to implement cooperation or coordination under article 21" should be added at the end of the Canadian amendment.

24. Mr. GLOSBAND (Observer for the International Bar Association) said that, having listened to the discussion of the
cannot be solved by cooperation and coordination under article 21 shall be solved pursuant to article 13 or article 16(2) by under the same rationale underlying, in the reciprocal case, the proceeding is a local main proceeding, then any conflict of payments. The provision in paragraph (2) would have no consequences would be. Under his country's law, the criterion for the opening of a collective proceeding was a generalized cessation of payments. The provision in paragraph (2) would have no meaning in his country and could only cause confusion. That was why he had originally proposed the deletion of the paragraph.

Otherwise, he could accept article 22 with the amendments suggested.

Mr. ABASCAL (Mexico) said that he would like to make some more observations on paragraph (2) in response to the question raised by the representative of China. The paragraph introduced a presumption without establishing what its consequences would be. Under his country's law, the criterion for the opening of a collective proceeding was a generalized cessation of payments. The provision in paragraph (2) would have no meaning in his country and could only cause confusion. That was why he had originally proposed the deletion of the paragraph.

Ms. MEAR (United Kingdom) supported the Canadian proposal, as had arisen in connection with article 17, namely the extent to which assets that should properly be within a non-main proceeding should be encompassed within the power of the representative of that non-main proceeding. He suggested amending the end of the paragraph to read: "the effects of that proceeding shall be restricted to assets that under the law of this State should be administered in that proceeding". That would mean that assets that were physically located in that State or should be located there but had been relocated, owing to fraud or error, would be encompassed in the proceeding.

Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said that the present wording was overly restrictive. He supported the amendment proposed by the observer for IBA.

Ms. SABO (Observer for Canada) said that the proposal of the observer for IBA met her concerns. A reference to article 21 would also be useful.

The CHAIRMAN suggested that informal consultations should take place with a view to working out an agreed text for paragraph (1).

Mr. MÖLLER (Finland) said that the substance of the proposals of the representative of the United States of America and the observer for IBA were acceptable to him. He would be against a reference to main and non-main proceedings.

Mr. TELL (France) found the present draft of paragraph (1) satisfactory, but could accept wording along the lines of the Canadian, United States and IBA proposals. With regard to paragraph (2), his concern was that it should apply to the commencement of local non-main proceedings; recognition of a foreign main proceeding should allow opening of a local non-main proceeding as rapidly as possible. It was a dangerous idea that insolvency proceedings affecting an affiliate should be taken as evidence that the parent company was bankrupt.

Mr. ABASCAL (Mexico) said that he would like to make some more observations on paragraph (2) in response to the question raised by the representative of China. The paragraph introduced a presumption without establishing what its consequences would be. Under his country's law, the criterion for the opening of a collective proceeding was a generalized cessation of payments. The provision in paragraph (2) would have no meaning in his country and could only cause confusion. That was why he had originally proposed the deletion of the paragraph.

Ms. MEAR (United Kingdom) supported the Canadian amendment as modified by the representative of the United States of America. The suggestion made by the observer for IBA deserved consideration.

Mr. MAZZONI (Italy) proposed that, in paragraph (3)(b), the words "recognition or" should be inserted after the words "commences after", and the reference to article 16 should be deleted. After the text in square brackets at the end of paragraph (3)(b), the following should be inserted: "and if such proceeding is a local main proceeding, then any conflict between such proceeding and the foreign proceeding which cannot be solved by cooperation and coordination under article 21 shall be solved pursuant to article 13 or article 16(2) by limiting the effects of the recognition of the foreign proceeding under the same rationale underlying, in the reciprocal case, the provision of article 22(1)".

That proposal presupposed a definition of a local main proceeding; it also presupposed that article 13 would deal with the problem of an attack on the decision recognizing a foreign proceeding in the case of application for a local proceeding. It further presupposed that the provision would be in a separate article from article 22 (hence the reference to "article 22(1)").

The result of his proposal would be that, if the attempt to coordinate left questions unresolved, they would be resolved by reference to article 13 or to article 16(2) amended as agreed at the previous meeting. The aim was to create equality of treatment: under article 22(1), recognition of a foreign main proceeding meant that a local proceeding must be in the nature of a non-main proceeding, with certain limitations stipulated. The same must be true in the inverse case: if the enacting State had jurisdictional grounds for opening a main proceeding, a foreign proceeding, even if previously recognized, and irrespective of the kind of recognition granted, must be treated as a non-main proceeding.

Mr. OLIVENCIA (Spain) said that article 22 was a key article and that the Commission would need time to consider the various proposals before it. The fundamental principle should be that, where there were concurrent proceedings, there should be coordination, cooperation and assistance; after that, consideration should be given to the specific cases. He was in general agreement with the arguments of the representative of Italy regarding the relationship between foreign and local proceedings. However, he also thought that, in paragraph (3)(a), the principle that the local proceeding took precedence should be expressed more forcefully by making the provision negative: instead of saying that "any relief ... must be consistent ...", the provision should say that "no relief may be granted ... that is inconsistent ...".

Like the representative of Mexico and others, he had reservations concerning paragraph (2). The proposed presumption could create serious problems because, in many legal systems, insolvency of the debtor was not the criterion for the opening of insolvent proceedings. Some systems relied on criteria such as cessation of payments, for example. As a last resort, however, he could accept the proposal of the representative of France.

Mr. WESTBROOK (United States of America) supported the suggestion made for clarifying the reference to article 16 in paragraph (3)(a) of article 22. The suggestion for the insertion of the words "recognition or" in paragraph (3)(b) was also helpful. He was less sure about the idea of deleting the reference to article 16 in paragraph (3)(b) unless it was agreed that the reference in article 16(2) as amended was sufficient to allow the modification of the effects of article 16 as a result of the opening of a local proceeding. With regard to the insertion proposed by the representative of Italy at the end of paragraph (3)(b), he had assumed that paragraph (3)(b) was adequate, because it was understood that the local proceeding would be the controlling factor. To the extent that the proposal was intended to address the problem of modification of an earlier recognition, that was an issue for article 13. His delegation considered that such issues should be resolved under local rules.

Mr. GLOSBAND (Observer for the International Bar Association) said that article 16(2) as amended allowed the modification of relief resulting from recognition, and the additional language proposed by the representative of Italy for article 22(3)(b) seemed unnecessary.

With regard to article 22(2), there seemed to be a number of countries which did not require the presumption of insolvency there, but it was an important issue for other countries that did require such a presumption to allow the commence-
ment of proceedings. The text could be placed in square brackets and it could be explained in the Guide to Enactment that those countries that needed it should enact it, and those that did not need it need not do so.

41. As to whether the provision in article 22(1)(a) should be stated in the negative, he could accept either that formulation or the present one.

42. The CHAIRMAN asked the Secretariat to summarize the amendments to article 22.

43. Mr. SEKOLEC (International Trade Law Branch) said that there were various partly overlapping proposals for the end of paragraph (1). The drafting group would have to consider how to marry those proposals.

44. In line with the proposal of the representative of France for paragraph (2), the words “foreign insolvency proceeding” in that paragraph could be replaced by the words “foreign main proceeding”.

45. With regard to the chapeau of paragraph (3) (A/CN.9/ XXX/CRP.3), the drafting group could consider how to amend it so as to say at the end that “the following shall apply”.

46. To take into account proposals made for subparagraph (a), in the third line, the last part of the subparagraph, after the words “is filed”, could be amended to read: “any relief under articles 15 or 17 must be consistent with the proceeding under … and, where the foreign proceeding is a main proceeding, article 16 does not apply”.

47. In subparagraph (b), the words “after the filing” could be amended to read “after recognition or the filing”. Another comment had related to the use, in that subparagraph, of the word “relief” without distinction in reference to articles 15, 16 and 17. The drafting group could seek a way of using the word “effects” in reference to article 16.

48. The proposal of the representative of Italy for subparagraph (b) was a matter of substance. One view was that it should be considered in the context of article 13. The effect on subparagraph (b) would then be a matter of drafting.

49. In subparagraph (c), the words “falling under the authority of the foreign representative” would be replaced by the words “that, under the law of this State, should be administered in the foreign non-main proceeding”.

50. Mr. ABASCAL (Mexico) said that the proposal by the observer for IBA for an explanation in the Guide to Enactment that not all countries might need to enact the provision in paragraph (2) was useful. A similar approach had been adopted in connection with a provision in the Model Law on Electronic Commerce. The paragraph need not be placed in square brackets.

51. Mr. MAZZONI (Italy) suggested that, to take into account a useful point that had been raised in the debate, the words “the courts of this State have jurisdiction to commence a proceeding … only” should be replaced by “proceedings can only be commenced in the State”.

52. The CHAIRMAN said that that suggestion could undoubtedly be accommodated.

53. Mr. GRIFFITH (Australia) said that he would not be in favour of making paragraph (2) optional, even if it was not necessary for some States. The inclusion of options, brackets etc. in the model law should be avoided. He would support the amended version proposed by the representative of France, provided that it was not optional.

54. Mr. SEKOLEC (International Trade Law Branch) said that the Commission always strove to avoid square brackets. However, he thought that the idea was to leave the amended paragraph (2) in the text and merely to mention in the Guide to Enactment that some countries might not wish to enact the provision because it was not in line with their criteria for recognizing insolvency.

55. Mr. ABASCAL (Mexico) said that he had originally proposed the deletion of the paragraph. However, he could accept the amended text with an explanation in the Guide to Enactment. That approach had precedents in other model laws.

56. The CHAIRMAN said that there seemed to be agreement that paragraph (2) should be retained as amended, subject to the inclusion of an explanatory note in the Guide to Enactment that there were countries under whose legal system inclusion of the provision would be inappropriate.

57. Turning to paragraph (1), he invited the Secretariat to read out a new version that was suggested to take into account the points raised earlier.

58. Mr. SEKOLEC (International Trade Law Branch) said it was suggested that the paragraph should read: “Upon recognition of a foreign main proceeding, a proceeding may be commenced in this State under [identify laws of the enacting State relating to insolvency] only if the debtor has assets in this State, and the effects of that proceeding shall be restricted to the assets of the debtor that are situated in the territory of this State and, to the extent necessary to implement coordination and cooperation under article 21, to other assets of the debtor that, under the law of this State, should be administered in such proceeding.”

59. Mr. WISITSORA-AT (Thailand) said that he had no objection to the wording suggested for paragraph (1). Regarding paragraph (2), either it could be placed in square brackets or there could be an explanation in the Guide to Enactment that States for which the provision was unnecessary could omit it.

60. The CHAIRMAN said that he thought that there was general agreement that an explanation in the Guide to Enactment would meet the problem. He asked if he could take it that paragraph (2), as amended by the representative of France, was approved.

61. Ms. LOIZIDOU (Observer for Cyprus) said that the question was not whether paragraph (2) was necessary but whether it was acceptable. Under her country’s law, when a bankruptcy petition was filed in the court could appoint an interim receiver of the property of the debtor and direct him to take immediate possession of that property. At that point, from the point of view of other States, there would be a “foreign proceeding” as defined in article 2(a). As a result an application might be made to the court in the enacting State, pursuant to article 13, to recognize that interim proceeding. If recognition was granted, the debtor, who had not even been adjudged insolvent in the foreign State, would be presumed to be insolvent in the enacting State. Her country could not accept a model law with that provision, and urged that it should be placed in square brackets.

62. The CHAIRMAN said that he thought that, even if a proceeding was called an “interim proceeding”, the debtor would for all intents and purposes have been adjudged bankrupt.

63. Ms. LOIZIDOU (Observer for Cyprus) said that, in her country, the adjudication of bankruptcy would come only at the end of the interim proceeding.
Summary record of the 619th meeting
21 May 1997, at 9.30 a.m.

[A/CN.9/SR.619]  
Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 9.35 a.m.

CROSS-BORDER INSOLVENCY:  
DRAFT MODEL LEGISLATIVE PROVISIONS (continued)  
(A/CN.9/435; A/CN.9/XXX/CRP.3, CRP.7)

Article 22 (continued)

1. The CHAIRMAN said he took it that paragraphs (1), (2) and (3) of article 22 were agreed upon with the amendments discussed at the previous meeting. On paragraph (4) (A/CN.9/XXX/CRP.3), no substantive comments had been made.

2. Mr. SEKOLEC (International Trade Law Branch) said that, in subparagraphs (a) and (b) of paragraph (4), the words “the conduct of” should be deleted, in line with the change made in subparagraphs (a) and (b) of paragraph (3).

3. The CHAIRMAN said he took it that the Commission agreed to the substance of paragraph (4).

4. He had not heard any comments on paragraph (5) (A/CN.9/XXX/CRP.7), and assumed that it was acceptable.

5. A suggestion had been made during the debate that article 22 should be made into a chapter, and that the individual provisions therein, currently forming paragraphs, should be made into articles.

6. Mr. SUTHERLAND-BROWN (Observer for Canada) said that that suggestion had already been made during the Working Group's deliberations.

7. The CHAIRMAN said that, if the Commission agreed, the matter could be referred to the drafting group.

8. Mr. GRIFFITH (Australia) wondered if the numbering of paragraphs as articles might cause difficulties with uniform enactment, because there was a possibility that what was now paragraph (2) might not be adopted in some countries. That would lead to inconsistent numbering of the articles from one country to another.

9. Mr. SEKOLEC (International Trade Law Branch) drew attention to the fact that the Commission was considering draft model legal provisions, not a model law as such. In many cases the numeration would be lost.

10. The CHAIRMAN said that he took it that there was agreement that the provisions on concurrent proceedings would form a separate chapter.

11. Mr. MAZZONI (Italy) suggested that the present article 22(2) could be given a number accompanied by "bis".

12. Mr. HERRMANN (Secretary of the Commission) said that the form “bis” was only used during the preparation of drafts, pending final renumbering, not in a final text. He suggested that the provision in the present paragraph (2) should form the last article in the chapter on concurrent proceedings, to minimize the effect of its non-inclusion. However, he hoped that Governments would include it.

13. The CHAIRMAN said that the matter would be left to the drafting group.

14. Mr. GRIFFITH (Australia), reverting to paragraph (5), said he wondered whether it would be better to amend the paragraph to make it clear that the foreign representative was to inform the court, firstly, of all foreign proceedings he knew of at the time of filing and, secondly, of any subsequent proceedings.

15. Mr. WESTBROOK (United States of America) drew attention to the accompanying proposal for article 13 in document A/CN.9/XXX/CRP.7. That dealt with the initial obligation of the foreign representative to inform the court of foreign proceedings known to him. The proposed article 22(5) concerned an ongoing obligation to disclose.

16. Mr. GLOSBAND (Observer for the International Bar Association) thought there should also be a provision requiring the foreign representative to advise the courts of changes in his status or that of the proceeding. That might be particularly
relevant in relation to termination of the proceeding, a matter that had been raised during the earlier debates.

17. Ms. SABO (Observer for Canada) agreed, and thought that such a provision should perhaps be inserted in article 13.

18. Mr. ABASCAL (Mexico) also supported the proposal made by the observer for IBA.

19. Mr. SEKOLEC (International Trade Law Branch) said that, in article 13, recognition could perhaps be made subject to an undertaking by the foreign representative to inform the court about any relevant changes affecting the foreign proceeding. The matter was not necessarily relevant only to concurrent proceedings.

20. Mr. ABASCAL (Mexico) said he agreed that the duty to inform could be covered in article 13. However, providing for the duty to inform was not the same as providing for termination of recognition in the event of termination of the foreign proceeding. That should also be discussed in relation to article 13.

21. Ms. NIKANJAM (Islamic Republic of Iran) agreed that the duty to inform should be covered in article 13, which dealt with the recognition of the foreign proceeding and the foreign representative.

22. Ms. SABO (Observer for Canada) thought that article 13 (2) could include the requirement that the foreign representative give an undertaking to inform the court of any changes in the circumstances of his appointment.

23. The CHAIRMAN said he took it that there was agreement that the point would be covered in article 13(2). On that understanding, he took it that article 22 was adopted.

**Article 20**

24. Mr. SEKOLEC (International Trade Law Branch) said that article 20 took into account the fact that in many, if not all, procedural systems there were provisions which allowed a party with an interest in the outcome of a dispute to be heard in that dispute. The foreign representative might have an interest in the outcome of a dispute between the debtor and a third party. That would relate to proceedings that had not been stayed, for whatever reason. The article expressly authorized the foreign representative, upon recognition of either main or non-main foreign proceedings, to intervene in individual actions in which the debtor was a claimant or defendant.

25. Mr. WIMMER (Germany) proposed that a reference to article 17(3) should be included to indicate that, in a non-main proceeding, the power to intervene was restricted.

26. Mr. SEKOLEC (International Trade Law Branch) thought that, to take care of that point, a second sentence could be added saying that, in the case of a foreign non-main proceeding, the intervention was to be restricted to matters related to assets under the law of the enacting State should be administered in that proceeding. Otherwise, one could say that the condition for intervention was some kind of legal interest on the part of the foreign representative.

27. Mr. ABASCAL (Mexico) agreed with the content of article 20. It was his understanding that the debtor would not thereby lose any rights that he enjoyed under the law of the enacting State. Regarding the language in square brackets, he would prefer the general terms “proceedings” and “party”.

28. Mr. KOIDE (Japan) supported the proposed reference to article 17(3). He thought that the proposal also related to article 19 bis.

29. Ms. NIKANJAM (Islamic Republic of Iran) agreed with the substance of article 20. She would be against imposing limitations on intervention in the case of a non-main proceeding. That would be covered by the law of the enacting State.

30. Mr. MARKUS (Observer for Switzerland) said that the point was really that the foreign representative must have a legal interest. That was perhaps self-evident, and the matter might best be left to local law.

31. Mr. MÖLLER (Finland) agreed. He supported the tenor of the article and, as far as the alternatives in square brackets were concerned, would have a preference for the words “proceedings” and “party”.

32. Mr. CHOUKRI SBAI (Observer for Morocco) supported article 20. However, the foreign representative would need to be notified of the proceedings referred to in order to be able to intervene.

33. Mr. PUCCIO (Chile) said that he was in general agreement with article 20 as drafted, without any reference to article 17. With regard to the wording in square brackets, he would prefer the words “proceedings” and “party”. Perhaps something should be added to make clear that only proceedings related to the assets of the debtor and to the insolvency were meant, and not, for example, matrimonial proceedings.

34. Mr. SEKOLEC (International Trade Law Branch) drew attention to the words “provided the requirements of the law of this State are met”. The question was whether that proviso was sufficient to meet the concern expressed.

35. Mr. PUCCIO (Chile) thought that it would be better to add further wording.

36. Mr. BERENDS (Observer for the Netherlands) supported the proposal of the representative of Germany. He did not feel that a reference to article 17 would be superfluous, because article 17(3) referred only to relief under that article. A reference to a “legal interest” might be confusing; the second sentence suggested by the Secretariat would be preferable. Regarding the second pair of alternatives in square brackets, he would prefer the word “party”.

37. Ms. SOROKINA (Russian Federation) supported article 20, including the reference to the requirements of the law of the enacting State. She would prefer the words “proceedings” and “party”.

38. Mr. SEKOLEC (International Trade Law Branch) noted that article 10 of the draft dealt with participation by the foreign representative in collective proceedings. Article 20 should really be restricted to intervention in individual proceedings.

39. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said that he would prefer “proceedings” and “party” because they were broader terms. As to the concerns of the representative of Chile, he thought that the danger that a foreign representative would interfere in matters unrelated to the debtor’s assets was more apparent than real. There was no need for restrictive language.

40. Mr. TELL (France) said that, bearing in mind that the intervention of the foreign representative would be subject to the law of the enacting State, he had no problem with article 20. Regarding the bracketed terms, he would prefer the general terms “proceedings” and “party”.

41. As to intervention in matrimonial proceedings, even such proceedings might involve property questions and be relevant
from the foreign representative's point of view. However, the matter would be governed by local law.

42. Mr. DOMANICZKY LANIK (Observer for Paraguay) supported article 20, and thought that the term "proceedings" should be used.

43. Mr. GUO Jingyi (China) said that his delegation supported article 20. However, article 16(1) provided for individual actions to be stayed. How, then, could a foreign representative intervene? Could individual actions be commenced or not?

44. Mr. SEKOLEC (International Trade Law Branch) explained that, in the case of recognition of a non-main proceeding, actions would continue unless the court ordered otherwise, and there would be scope for intervention by the foreign representative. In the case of recognition of a main proceeding, article 16(1)(a) would apply, but some actions might continue in virtue of article 16(2). To the extent that the debtor retained the right himself to initiate actions, the foreign representative might have an interest in assisting the debtor to win those actions.

45. Mr. BERENDS (Observer for the Netherlands) thought that article 20 should refer to "individual actions or individual proceedings", using the same language as in articles 16(1)(a) and 17(1)(a).

46. Ms. SABO (Observer for Canada) said that she was satisfied with article 20 as it stood. She would prefer the broader terms "proceeding" and "party". However, she could agree to the expression "individual actions or individual proceedings", which might have the advantage of stressing the difference between article 10 and article 20.

47. Mr. SEKOLEC (International Trade Law Branch) said that the intention in articles 16(1)(a) and 17(1)(a) had been to cover extrajudicial proceedings. He was not sure whether that would apply in the case of article 20.

48. Mr. CHOUKRI SBAI (Observer for Morocco) thought that the reference should be to both proceedings and actions. Both terms were needed. There were many kinds of proceedings that might have an impact on the debtor's assets, including proceedings other than actions as such. To cover all aspects of the problem, a reference could also be added to "proceedings or actions pertaining to implementation or execution".

49. Mr. SEKOLEC (International Trade Law Branch) sought guidance from members of the Commission as to whether, in the case of extrajudicial proceedings against the assets of the debtor, there was scope for intervention by the foreign representative and, if so, whether that should be mentioned in the model law.

50. Ms. MEAR (United Kingdom) agreed with the view that both "proceedings" and "actions" should be encompassed. Otherwise, she was quite happy with the tenor and objective of the article.

51. Mr. ABASCAL (Mexico) thought that a reference to "individual proceedings" would be quite inappropriate. The debtor might have rights in collective proceedings, such as claims against another bankrupt debtor. The term "proceedings", without qualification, was the most appropriate. With regard to proceedings other than judicial proceedings, they would also be covered by the term, subject only to the law of the enacting State.

52. Ms. NIKANJAM (Islamic Republic of Iran) wondered what the difference was between "actions" and "proceedings". It might be desirable to speak of insolvency proceedings.

53. Ms. INGRAM (Australia) thought that the term "proceedings" was acceptable, and would not be in favour of a restriction along the lines of article 17(2). The expression "the law of this State" seemed inappropriate language for model provisions. If it meant the general law of the State, the phrase was redundant. If it meant the specific laws, the usual bracketed language should be used, calling on the enacting State to identify the laws.

54. Mr. TELL (France) felt that "proceedings" was a suitably broad term. However, to meet the concerns of some delegations, the expression "any action or proceeding" could be used.

55. Mr. WESTBROOK (United States of America) said, regarding the suggestion made by the representative of Germany, that it was inherent in the text that the power of a representative to intervene in a non-main proceeding was limited. A reference in the Guide to Enactment would probably be sufficient to take care of the problem.

56. With respect to intervention in non-judicial proceedings, he shared the view that no special reference was necessary. A possibility would be to speak of "any proceedings, including individual actions". He preferred "party" in the second pair of alternatives.

57. Mr. MOLLER (Finland) supported the proposal of the representative of the United States. Regarding the comments made by the representative of Australia, he would strongly oppose deletion of the reference to the law of the State concerned, which he considered essential. With regard to arbitration proceedings, it should be borne in mind that intervention in such proceedings required the consent of the parties or the arbitrator.

58. Mr. SEKOLEC (International Trade Law Branch), at the request of the Chairman, read out the following suggested text for article 20 taking into account the discussions:

"Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of [refer to the provisions of law in this State governing interventions in individual actions and other proceedings] are met, intervene in any proceedings, including individual actions, in which the debtor is a party."

59. The Guide to Enactment might then give further guidance as to what provisions might be referred to and what was meant by intervention.

60. Mr. MOLLER (Finland) said that he would prefer the original text in document A/CN.9435. Intervention might be governed by principles of law other than statutes, and there might be no legal provisions to refer to.

61. Mr. HERRMANN (Secretary of the Commission) said that the question of arbitration complicated the matter. In the case of arbitration, the rules on intervention might not be governed by the law of the enacting State. It might be better to refer simply to "requirements of law" or "legal requirements".

62. Mr. MOLLER (Finland) supported that view.

63. Mr. CHOUKRI SBAI (Observer for Morocco) said that the draft reaod out earlier by the Secretariat was very satisfactory, and in line with procedures in his country. However, the word "interventions" in the bracketed text should be in the singular.

64. In reply to a question from Ms. NIKANJAM (Islamic Republic of Iran), Mr. SEKOLEC (International Trade Law
Branch) said that the purpose of using the expression “any proceedings, including individual actions” would be to cover both individual actions and collective proceedings, including extrajudicial proceedings.

65. Mr. ABASCAL (Mexico) said that he had a problem with the phrase in square brackets in the text read out by the Secretariat. To refer to all the provisions covering different types of proceedings would make the model law too complicated. The original draft was preferable.

66. Mr. TELL (France) said that it would be difficult to indicate all the provisions relevant to intervention in proceedings. Instead, he proposed the following text at the end of the article: “[refer to the conditions provided for by the applicable law governing intervention in any proceeding, including individual actions]”.

67. Mr. GLOS BAND (Observer for the International Bar Association) thought that it would be simpler for the text to be left as originally drafted up to the words “interfere in” and then read “any proceedings, including individual actions, in which the debtor is a party.” There was no need for the applicable provisions of local law to be detailed.

68. Ms. SHANG Ming (China) said that it did not seem a good idea to require specific provisions of law to be listed. She would prefer the original draft or, as the Secretary had suggested, a simple reference to “the requirements of law”.

69. Secondly, he recalled that it had been said earlier that article 10 dealt with collective proceedings and article 20 with individual proceedings. If it was now proposed to cover collective proceedings in article 20, he wondered if article 10 could be deleted.

70. Ms. INGRAM (Australia) said that her delegation would not insist on its suggestion to have specific provisions cited. However, she still considered that a wording such as “provided the requirements of the law of this State are met” was inapposite in a model law: it was self-evident that the provisions would be subject to the law of the enacting State. Perhaps the reference should be deleted altogether.

71. Mr. SEKOLEC (International Trade Law Branch), replying to the point raised by the representative of China, said that the idea was to cover cases where the debtor would want to claim a right in a collective proceeding, for example in another insolvent proceeding. Article 10, on the other hand, concerned intervention in collective proceedings against the debtor. There was therefore a place for both article 10 and the expanded article 20.

72. Mr. BERENDS (Observer for the Netherlands) asked what had happened to the proposal by the representative of Germany to refer to article 17(3).

73. The CHAIRMAN said that that proposal did not seem to have received sufficient support, and had therefore not been reflected in the new wording.

74. Mr. COOPER (Observer for the International Association of Insolvency Practitioners) welcomed the suggestions made by the representative of France and the observer for IBA. Enacting States would doubtless vary the provision in article 20, but the model law should not seek to regulate that matter.

75. Mr. DOMANICZKY LANIK (Observer for Paraguay) suggested that the text should provide for the possibility of intervention “in accordance with the legal provisions”.

76. Mr. GRANDINO RODAS (Brazil) thought that the language proposed by the observer for IBA was the most suitable.

77. Mr. OLIVENCIA (Spain) said that he would favour the wording proposed by the representative of France, but without the phrase “including individual actions”, which only complicated the matter and was misleading, since individual actions were in fact the main type of proceeding referred to.

78. Ms. LOIZIDOU (Observer for Cyprus) considered the draft proposed by the observer for IBA to be perfectly satisfactory.

79. Mr. ABASCAL (Mexico) considered the draft proposed by the representative of France to have broad support.

80. The CHAIRMAN asked the representative of France and the observer for IBA to read out their specific proposals.

81. Mr. TELL (France) said that the purpose of his proposal was to refer to the conditions provided for by local law rather than to the laws. He proposed that the article should read: “Upon recognition of a foreign proceeding, the foreign representative may intervene in any proceedings [including individual actions] in which the debtor is a party [refer to the conditions provided for by the applicable law of the State governing intervention in any proceeding].” The words “including individual actions” could be included or omitted.

82. Mr. GLOS BAND (Observer for the International Bar Association) said that his version was intended to avoid requiring the specification of provisions concerning conditions for intervention. The text he had proposed read: “Upon recognition of a foreign proceeding, the foreign representative may provide the requirements of this State are met, intervene in any proceedings, including individual actions, in which the debtor is a party.” However, he agreed that the phrase “including individual actions” was not necessary.

83. Mr. MÖLLER (Finland) thought that the proposal of the observer for IBA was to be preferred. It would be unnecessarily complicated for the legal provisions concerned to be specified; besides, in countries such as his, intervention was not governed by statute, but by case law.

84. Mr. TELL (France) said that the proposal of the observer for IBA was close to the original draft, which he had favoured from the outset. His own suggestion had been a suggestion for amending the text read out following the comment made by the representative of Australia. The IBA proposal was satisfactory to him.

85. Mr. CHOUKRI SBAI (Observer for Morocco) thought that there was a clear distinction between proceedings and individual actions, and that the reference to individual actions should be retained. He preferred the wording read out by the Secretariat.

86. Mr. GRIFFITH (Australia) said that his delegation was not insisting on its suggestion. The Commission could perhaps adopt the text proposed by the observer for IBA.

87. Mr. MARKUS (Observer for Switzerland) supported the proposal of the observer for IBA.

88. The CHAIRMAN said that the IBA proposal seemed to have broad support.

89. Mr. CHOUKRI SBAI (Observer for Morocco) said that he could support the IBA proposal, but would like the reference to individual actions to be retained.
90. The CHAIRMAN said that the prevailing view seemed to be that the reference to individual actions was not necessary. He took it that the Commission favoured the text for article 20 proposed by the observer for IBA, on that understanding.

Article 21

91. Mr. SEKOLEC (International Trade Law Branch) said that the purpose of article 21 was to provide a statutory framework for cooperation between courts supervising collective insolvency proceedings and for cooperation between insolvency administrators. Paragraph (1) dealt with the situation of the court engaging in cooperation with foreign courts and foreign representatives. Paragraph (2) dealt with the situation of the local insolvency administrator.

92. Paragraph (1) expressly authorized the court to communicate directly with foreign courts or foreign representatives. In some countries, that would be something of a novelty. The reference to article 1 made it clear that the cooperation referred to was cooperation for the purposes of the Model Provisions.

93. It was emphasized in paragraph (2) that, when the local insolvency administrator was in contact with foreign courts or foreign insolvency administrators, the local administrator could take action only within the limits of his or her authority and subject to the supervision of the court.

94. Paragraph (3) contained an open-ended list indicating the forms that cooperation might take. The word "court" in paragraph (3) meant the court in the enacting State. However, subparagraph (d) used the expression "courts" in the plural. That presumably referred to courts in the enacting State and in the foreign State. Subparagraph (e) had two alternatives. In the first alternative, the Commission might wish to replace the expression "multiple proceedings" by "concurrent proceedings". On a point of drafting, article 21 might be made a separate chapter, perhaps entitled "Cooperation with foreign courts and foreign representatives" and its paragraphs might be made separate articles.

The meeting rose at 12.30 p.m.

Summary record of the 620th meeting

Wednesday, 21 May 1997, at 2 p.m.

[A/CN.9/SR.620]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 2.10 p.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (continued) (A/CONF.9/435)

Second Multinational Judicial Colloquium on Cross-Border Insolvency

1. The CHAIRMAN invited the observer for INSOL to report on the work of the Second Multinational Judicial Colloquium which had taken place at New Orleans, United States of America, in March 1997.

2. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said that the Colloquium had been attended by 45 judges and judicial administrators from some 20 countries. It had discussed judicial cooperation and the draft Model Legislative Provisions. The participants had examined a number of current cross-border cases.

3. It had been concluded that communication between the courts was possible, provided that it was carefully done, with appropriate safeguards. It should be done openly with advance participation of the parties involved, and preferably in the presence of those parties. Communication might include exchanges of formal orders or judgements, the supply of informal writings and the transmission of transcripts. Means of communication included video, telephone and fax. It had also been felt that, when communication was necessary and was intelligently used, it could be of considerable benefit to all the parties involved.

4. Even in circumstances where there was an absence of communication between the courts, cooperation might be extended. Provided that the representatives of the foreign State were accorded standing to be heard, the goals of coordinated proceedings could still be achieved through the use of protocols, agreement to use the principles contained, for example, in the Cross-Border Insolvency Concordat prepared by IBA, and the like.

5. The meeting had also considered draft Model Legislative Provisions prepared by the Working Group, and particularly the section on judicial cooperation. The general conclusion had been that the implementation of legislation of the type proposed would give a useful formal foundation to the communication process that was being developed in some countries. The model legislation would provide the basis for enabling the courts to be approached more easily, conveniently and quickly. That was extremely important in insolvency questions, in view of their urgency, and a matter of common sense. It had not been suggested that judicial cooperation should infringe on any substantive or procedural rights.

6. It had been concluded that the old methods, where each court protected its own sovereignty, would not suffice when the parties were faced with the difficulties of rescuing a corporate enterprise established in more than one jurisdiction. It had been felt that a new spirit of cooperation was required, with each jurisdiction being prepared, where appropriate, to defer to other jurisdictions. It had also been considered that the best way to ensure that judges were able to cooperate was to give them the statutory authority outlined in the Model Legislative Provisions.

Article 21 (continued)

7. Ms. SABO (Observer for Canada) said that she was generally satisfied with article 21. She suggested however, for consistency with the rest of the text, that the expression "is permitted to" in paragraphs (1) and (2) should be replaced by the word "may". In the two pairs of alternatives in square brackets in paragraph (2), she would prefer the first alternative. In para-
8. Ms. NIKANJAM (Islamic Republic of Iran) expressed satisfaction with the substance of article 21. She thought that the words “Authorization of” in the title were unnecessary.

9. Mr. MAZZONI (Italy) said that he was generally very satisfied with article 21. He supported the view that, in paragraph (2), the expression “subject to the supervision of” would be preferable to “without prejudice to the supervisory functions of”. He agreed with the representative of the Islamic Republic of Iran that the words “Authorization of” were not needed in the title.

10. Mr. ABASCAL (Mexico) said that he too agreed with article 21. In paragraph (2), he would prefer the broader expression “without prejudice to the supervisory functions”. The expression “subject to the supervision of” would make supervision obligatory, whereas it might not be required under the local legislation.

11. Regarding paragraph (3)(a), he wondered whether it was necessary for the person or body appointed to have to act “at the discretion of the court”.

12. In paragraph (3)(e), he would prefer the expression in the first pair of square brackets.

13. Mr. CHOUKRI SBAI (Observer for Morocco) fully supported the content of article 21. However, he would like to suggest that the words “and to protect the interests concerned” should be added at the end of paragraph (3)(a).

14. Mr. TELL (France) said that he supported article 21, although the position of his delegation had always been that judicial cooperation should be dealt with in international agreements and be subject to reciprocity. The provisions of the model law could be reflected in the necessary bilateral or multilateral treaties. He shared the view that the words “Authorization of” should be deleted in the title and that the expression “subject to the supervision of” was to be preferred in paragraph (2).

15. Mr. BERENDS (Observer for the Netherlands) said that the text was acceptable, although it was not wholly clear to him what was meant by “cooperation”.

16. Mr. GILL (India) said that he supported the framework for cooperation provided by article 21. Regarding paragraph (2), however, direct communication between courts or with the foreign representative might in some cases be difficult, and need the assistance of government departments. In paragraph (3)(a), the words “at the direction of the court” should be kept. He agreed that the words “Authorization of” in the title should be deleted.

17. Ms. MEAR (United Kingdom) said that she was content with the article as it stood. In paragraph (2), she preferred the phrase “subject to the supervision of”. In paragraph (3)(e), she preferred the text in the second set of square brackets.

18. Mr. MARKUS (Observer for Switzerland) said that he was satisfied with the text. In paragraph (2), he preferred the phrase “subject to the supervision of”. In paragraph (3)(e), he preferred the text in the first set of square brackets.

19. The CHAIRMAN asked for members’ views on the amendments suggested by the representative of Mexico and the observer for Morocco.

20. Ms. MEAR (United Kingdom) said that she did not support either of the amendments suggested.

21. The CHAIRMAN said that he had heard no support for the suggestions of the representative of Mexico and the observer for Morocco. There seemed to be agreement on the deletion of the words “Authorization of” in the title, and the drafting changes suggested by the observer for Canada.

22. There had been a division of views on the alternative texts in square brackets in paragraph (3)(e).

23. Mr. WESTBROOK (United States of America) said that he could accept either of the bracketed alternatives in paragraph (3)(e), although he had a slight preference for the first alternative.

24. The CHAIRMAN said that the prevailing view seemed to be that the first of the alternatives in square brackets should be adopted in each case in paragraph (2), and that similarly, in paragraph (3)(e), the first alternative should be adopted. On that understanding, and with the agreed amendments, he took it that the Commission accepted article 21.

**Article 21**

25. Mr. SEKOLEC (International Trade Law Branch) said that article 23 concerned a mathematical rule which in insolvency jargon was called the “hotchpot” rule, and which said in effect that a creditor making claims in more than one concurrent proceeding should not benefit unfairly by so doing.

26. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said that the provision reflected the way insolvency practice worked in most parts of the world. It ensured fairness.

27. Ms. INGRAM (Australia) suggested that, for consistency, instead of the expression “an insolvency proceeding commenced in another State”, the phrase “a foreign proceeding” should be used.

28. Mr. SEKOLEC (International Trade Law Branch) said that the Commission might wish to make a choice between the bracketed expressions “secured claims” and “rights in rem”, the substance of which was intended to be the same.

29. Mr. MAZZONI (Italy) said that the two expressions did not mean exactly the same thing in all countries. He would prefer “secured claims”; otherwise, both expressions should be used. Secured claims did not create rights in rem, but must receive preferential treatment for the reason that they were secured.

30. Mr. ABASCAL (Mexico) said that he was largely in agreement with the representative of Italy. There were secured claims, claims that created rights in rem and claims entitled to preferential treatment under local law. He felt that all those categories of claims should be mentioned.

31. Ms. MEAR (United Kingdom) said that both the expression “secured claims” and the expression “rights in rem” should be kept. They were certainly not the same thing in her jurisdiction and, she suspected, in other jurisdictions; they were very specific terms of art.

32. Mr. MARKUS (Observer for Switzerland) said he was not sure that he could agree to the retention of both terms. “Secured claims” seemed to be the broader notion. He wondered what precisely was meant by “rights in rem”, and whether “secured claims” covered “rights in rem”.

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33. Mr. GRiffiTH (Australia) said that “secured rights” were rights against particular property, real or personal, such as a mortgage, a lien or some right against a particular asset; the creditor’s remedy was to pursue the asset. A “right in rem”, in common law, meant title that could be vindicated as against the entire world by the common-law legal system; it might mean the right to arrest a ship, for example. In the case of rights to security, one might be just one of many secured creditors, as a mortgage, a lien or some right against a particular asset; in common law, meant title that could be vindicated as against the entire world by the common-law legal system; it might mean the right to arrest a ship, for example. A “right in rem” meant a legal right, which might be against a particular property, enforceable against all third parties. There might be some overlap, but the two terms did not mean the same thing. In the case of insolvency law, the term “secured rights” tended to be used.

34. Mr. BERENDS (Observer for the Netherlands) said that he would prefer to have both terms in the text.

35. Ms. SABO (Observer for Canada) said that she would be content to have both terms in the text, separated by the word “or”.

36. Mr. GLOSBAND (Observer for the International Bar Association) suggested that, in the phrase “a payment for the same claim in a proceeding commenced in this State”, the word “commenced” should be deleted. After the words, “the payment to the other creditors of the same class”, the words “for their claims in the proceeding commenced in this State” could also be omitted. Those changes would not affect the meaning.

37. Mr. AL-NASSER (Saudi Arabia) thought that a term such as “preferred claims” would be better. The term “rights in rem” might be unclear in his country.

38. Mr. CHOUKRI SBAI (Observer for Morocco) said that, in his country, secured claims and rights in rem were different. Both terms should be kept. He also suggested the insertion in the fifth line of the words “equal to or” before “proportionately less”.

39. Mr. ABASCAL (Mexico) thought that the best course, in order to avoid confusion, would be to include a reference to the law of the enacting State. “Secured claims” and “rights in rem” could have different meanings in different legal systems, and they would not cover all claims entitled to preferential treatment, including “privileged claims” of many kinds.

40. Mr. WESTBROOK (United States of America) thought that, without going into problems of precise definition, “secured claims” or “rights in rem”, at least in the English text, would convey what was meant reasonably well. Perhaps the drafting group could be left to finalize the various language versions.

41. Mr. MARKUS (Observer for Switzerland) said that, following the explanations given, he would be in agreement with including both “secured claims” and “rights in rem” in the text.

42. Ms. LOHZIDOU (Observer for Cyprus) supported the proposal of the representative of Mexico, because her country’s law on bankruptcy referred to secured claims and also to other debts which had priority, such as taxes under municipal law. The inclusion of a reference to such debts would be helpful.

43. Mr. MAZZONI (Italy) said that, if the Commission did not adopt the course proposed by the representative of Mexico, it would be important to retain both terms. The reference to rights in rem would mean that the fact that someone was the owner of an asset in the hands of the administrator of the proceeding would not, under the rule, diminish his rights as a creditor.

44. Mr. SEKOLEC (International Trade Law Branch) said that the proposed rule would not affect the priority of one creditor over another, as it was concerned with ensuring equal treatment for “creditors of the same class”. With regard to the fact that “secured claims” and “rights in rem” might have varying meanings under local law, it should be borne in mind that two different countries would be involved in the situation being considered.

45. Mr. SHANG Ming (China) said that he could accept the retention of both terms. However, having listened to the discussion, he wondered whether the term “preferential claims” would not be better than “secured claims”.

46. The CHAIRMAN said that there seemed to be strong support for saying “secured claims or rights in rem”. The suggestions made by the observers for IBA and Morocco could be considered by the drafting group.

47. Mr. ABASCAL (Mexico) said that the explanation just given by the Secretariat had removed his concerns. He agreed with the text.

48. The CHAIRMAN said he took it that the article was accepted on the basis he had indicated.

Preamble

49. Mr. SEKOLEC (International Trade Law Branch) said it had been suggested that, in line with other UNCITRAL model legislation, the Model Legislative Provisions should be preceded by a preamble. Not all countries had the practice of including preambles in their laws; in such cases, the material could be used in a separate document, or its substance could be included in the operative part. The preamble might be useful in the interpretation of the law.

50. Mr. MAZZONI (Italy) suggested the deletion in subparagraph (e) of the words “thereby protecting investment and preserving employment”, it would be preferable to avoid any judgement as to why financially troubled businesses should be rescued.

51. Mr. BERENDS (Observer for the Netherlands) supported that suggestion.

52. Ms. NIKANJAM (Islamic Republic of Iran) opposed the suggestion. The model law should be made attractive to legislative bodies, and protecting investment and preserving employment were very attractive.

53. Mr. OLIVENCIA (Spain) said that protecting investment and preserving employment were commendable aims. However, it was the content of a law that was important. The purpose of the model law was to facilitate the conduct of insolvency proceedings. That might result either in the rescue of a business or in its efficient liquidation. The model law did not provide for specific measures to keep businesses going. The rescue of a financially troubled business, the protection of the investment and the preservation of employment was only one possible outcome. He would prefer to speak in subparagraph (e) of facilitating the development of insolvency proceedings and the solution of the problems involved, without referring to specific purposes.

54. Mr. TELL (France) said that subparagraph (e) was in line with legislation in his country. He would prefer to retain the text as it stood. Protecting investment and preserving employ-
ment were not direct objectives of the model law, but expected consequences of the rescue of financially troubled businesses.

55. Mr. WESTBROOK (United States of America) agreed that the reference to the preservation of investment and employment could be kept. In any case, enacting States might not wish to include the preamble in their legislation.

56. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said that, in individual cases, some of the objectives stated in the draft preamble might be in conflict, and countries might have to decide whether the objectives in subparagraphs (d) or (e), for example, should take precedence. However, the text under discussion was the preamble to a model law dealing with the specific problems of cross-border insolvency. It was for domestic law to determine the priority of its national insolvency laws.

57. Mr. CHOUKRI SBAI (Observer for Morocco) thought that subparagraph (e) should be confined to “facilitation of the rescue of financially troubled businesses”. The second part could be moved to subparagraph (b), which could refer to greater legal certainty for trade, the protection of investment and the preservation of employment.

58. He would also suggest the insertion at the beginning of paragraph (a) of the word “effective”.

59. The CHAIRMAN said that the proposal of the representative of Italy for the deletion of the phrase “thereby protecting investment and preserving employment” did not seem to have the Commission’s support.

60. Mr. OLIVENCIA (Spain) recalled that he had proposed the use of broader wording in subparagraph (e). It would hardly be possible for the sale of an enterprise to be authorized under a law whose preamble stated that financially troubled businesses were to be rescued.

61. Mr. MAZZONI (Italy) said that he could support the gist of the Spanish proposal, but that it would be important to find satisfactory wording.

62. The CHAIRMAN said that the changes suggested to the draft preamble did not seem to have wide support, and that the prevailing view seemed to be that the text should remain as drafted by the Working Group.

Article 1

63. Mr. SEKOLEC (International Trade Law Branch) said that article 1 consisted of two paragraphs.

64. The chapeau of paragraph (1) contained the alternatives “Law” and “Section”, because the enacting State might enact the provisions as a separate law or include them as a section in existing insolvency legislation. The subparagraphs covered four different situations addressed by the Model Legislative Provisions. They did not establish rights or obligations. They set out the framework. Subparagraph (a) dealt with incoming requests for assistance. Subparagraph (b) dealt with outgoing requests. Subparagraph (c) indicated that there might be concurrent proceedings and that some provisions were necessary to deal with that situation. Subparagraph (d) referred to the possible interest of creditors in a foreign State in requesting insolvency proceedings in the enacting State, or participating in such proceedings.

65. Paragraph (2) indicated that the Model Law did not deal with cases where a financial services institution subject to special regulation in the enacting State became insolvent. The institutions to be covered would be determined by the enacting State. Besides banks and insurance companies, the provision might apply in some countries to collective investment companies.

66. Mr. BURMAN (United States of America) said that his delegation would suggest a footnote to the article stating that some States might wish to exclude consumer debts from the scope of application of the provisions. Some countries had special consumer protection laws which would take precedence over general insolvency laws in some matters. The proposed exclusion would read: “If a debtor’s debts were incurred primarily for personal, household or family purposes, rather than for business purposes, a proceeding regarding that debtor is not a foreign proceeding under this law.”

67. Mr. CHOUKRI SBAI (Observer for Morocco) supported the suggestion made by the representative of the United States of America. In his country, a distinction was drawn between commercial and personal insolvency.

68. Mr. TELL (France) said that his delegation would like consumers to be excluded from the scope of application of the provisions. However, to take into account the views of other delegations, he could accept the idea that the point should be covered in a footnote, worked along the lines proposed by the representative of the United States.

69. Ms. LAZAR (Observer for the International Women’s Insolvency and Restructuring Confederation) supported the footnote proposed by the representative of the United States.

70. Mr. BERENDS (Observer for the Netherlands) said that the Commission had always taken the position that footnotes and options should be kept to a minimum. He was therefore opposed to a footnote to article 1. There could be a reference in the Guide to Enactment. Those countries that wished to exclude consumer debts could always do so.

71. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said that the footnote should refer to the debtor’s “liabilities” rather than the debtor’s debts.

72. Mr. ABASCAL (Mexico) agreed with the proposal made by the representative of the United States, which would take into account the fact that, in his country, non-traders were not subject to bankruptcy proceedings.

73. Mr. WISITSORA-AT (Thailand) supported the proposal made by the representative of the United States.

74. Ms. INGRAM (Australia) said that the matter under consideration had been debated in the Working Group, which had reached a consensus that consumer bankruptcies should not be expressly excluded. She was very concerned at the inclusion of the proposed reference at the present stage. Her experience was that it was difficult in practice to define the difference between personal and business debts. To include such an option would permit States to narrow the scope of the law. Her country also had separate regimes for personal and business insolvency, and it was envisaged that the same model provisions would apply to both.

75. Mr. BURMAN (United States of America) said he agreed that footnotes were in general undesirable; however, in the present case, the proposed footnote was important and had wide support. A similar formulation had been included in a number of UNICTRAL texts, such as the Model Law on Electronic Commerce.

76. Mr. MARKUS (Observer for Switzerland) said he agreed that there should not be too many footnotes, but did not have
strong views on the matter. However, he had some concerns over the proposed wording. He was not clear as to the scope of the exclusion. Would it relate only to foreign proceedings?

77. Mr. MAZZONI (Italy) thought that there should be an express exclusion of consumers in the law. In his country, it would be contrary to public policy to allow a foreign representative to open proceedings against a national consumer. Without such an exclusion, the purpose of the model law would be frustrated in all those countries which did not recognize insolvency of non-traders.

78. Mr. TELL (France) said he thought that the point was important enough to merit mention in a footnote. His original intention had been to propose a new paragraph stating that the law would not apply when the debtor's debts had been incurred essentially for domestic or other personal purposes rather than for commercial purposes. The issue should be dealt with either in the text itself or in a footnote.

79. Mr. BERENDS (Observer for the Netherlands) reiterated that the Commission had earlier taken a position against the use of footnotes.

80. Mr. SANDOVAL (Chile) supported the proposal of the representative of the United States. The Commission was concerned with trade law questions. In other UNCITRAL and UNIDROIT instruments, consumer-related issues had been excluded.

81. Mr. CALLAGHAN (United Kingdom) said that in his country bankruptcy law made no distinction between the consumer debtor and the trade debtor. He supported the view that there should be no exclusion for consumer debtors. He could even envisage situations where such an exclusion might provide a dangerous loophole for debtors. The model law should make no distinction between consumer and trade debtors. He would, however, be quite happy with the inclusion of the proposed text in the Guide to Enactment.

82. Mr. FRIMAN (Observer for Sweden) supported the view expressed by the representatives of Australia and the United Kingdom. He could accept the issue being addressed in the Guide to Enactment.

83. Mr. ABASCAL (Mexico) said that the technique of footnotes had been used in earlier UNCITRAL instruments. In his country's legislation, commercial and non-commercial activities were treated differently. The United States proposal would exclude debts other than trading debts. The model law must take into account the situation in all countries. A similar formula had been used in other instruments such as the Vienna Sales Convention.

84. Mr. WESTBROOK (United States of America) thought that there was sufficient support for the footnote to make it appropriate in the present case, and there were precedents. Concerns about the precise wording could be resolved in consultation with other delegations.

85. The CHAIRMAN said that the proposal of the representative of the United States seemed to enjoy wide support, although there were still questions about the drafting.

86. Mr. SEKOLEC (International Trade Law Branch) noted that, in the wording proposed by the representative of the United States, a proceeding concerning a consumer debtor would not be a foreign proceeding for the purposes of the model law, whereas the representative of France and other speakers had suggested a provision stating that the law would not apply when there was a consumer insolvency. There might be a slight difference in substance, and the two approaches should perhaps be reconciled.

87. Ms. SABO (Observer for Canada) asked where the footnote indicator would be placed and whether the footnote would suggest an additional paragraph (3) to article 1.

88. Mr. MARKUS (Observer for Switzerland) said that he would prefer the wording suggested by the representative of France, which would result in the complete exclusion of consumer debtors from the model law.

89. Mr. BURMAN (United States of America) suggested that the delegations concerned should consult informally to agree on a text.

90. Mr. TER (Singapore), turning to paragraph (2), said that he would have a problem if the provision was limited to financial services institutions because, under his country's law, public utility companies were also subject to special regulation and excluded from the insolvency provisions of the Company Act. He therefore suggested that paragraph (2) should be extended to include such companies, or that there should be no restriction on exclusions under the paragraph. The public policy provision did not seem to provide an adequate escape.

91. Mr. MARKUS (Observer for Switzerland) said that, although he agreed with the substance of the text, it could lead to misunderstandings. If, for example, it was stated that the law did not apply where the debtor was a bank and its insolvency was subject to special regulation, that could imply that the country could not allow the application of the model law even if it wished to. States should be allowed to have the model law apply if they wished.

92. Mr. CALLAGHAN (United Kingdom), commenting on the remarks of the representative of Singapore, said that his country had similar cases, such as the privatized railway companies. Special provisions had been enacted to prevent a situation where the railways stopped running. However, it would be unfortunate to increase the number of businesses excluded from the model law. There were other protections in the model law, such as the exclusions for public policy under article 6, or the provision in article 18(2) allowing for modification of the automatic relief resulting from recognition of a foreign main proceeding. In other words, there were sufficient protections in the model law as a whole.

The meeting rose at 5.05 p.m.
CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (continued) (A/CN.9/435)

Article 1 (continued)

1. The CHAIRMAN said that the question of the wording of a footnote concerning consumer debtors remained open from the previous meeting. He asked the Secretariat to inform the Commission of the wording suggested following informal consultations.

2. Mr. SEKOLEC (International Trade Law Branch) said it was suggested that there should be a footnote to the title of article 1. The wording of the introductory part of the footnote had not been finalized, but it might indicate that States wishing to exclude certain categories of debtors, or debtors whose debts had been incurred predominantly for personal, family or household purposes, might wish to include in the article "the following provision". The provision suggested would read: "This Law does not apply where the debtor's debts were incurred predominantly for personal, family or household purposes." Parts of the formulation had been taken from article 2 of the Vienna Sales Convention.

3. Ms. SABO (Observer for Canada) said that the suggested wording posed a serious obstacle to her delegation. It would be very difficult to be sufficiently precise to arrive at a satisfactory determination of what needed to be excluded. Under her country's insolvency laws, the trustee was required to seek assets in her country and in the neighbouring United States. The suggested provision would create a serious obstacle to a process which currently worked well. The reference was to a "debtor", not to an individual, and it would contribute to a demand for reciprocity.

4. Mr. TELL (France) said that the words "rather than commercial purposes" could perhaps be added at the end of the suggested provision. Perhaps a formula could also be found to accommodate the concerns of the observer for Canada.

5. Mr. GRIFFITH (Australia) said that the suggested footnote ran counter to the basic aim of a uniform model law. The term "debtor" could include a corporation or a family trust and could allow such entities to evade the effects of the model law. If consumer debts were to be excluded, they should be referred to explicitly. However, he felt strongly that any such provision would create uncertainty and undermine the expeditious conduct of proceedings.

6. Ms. NIKANJAM (Islamic Republic of Iran) said that the suggested wording caused her some problems, as the term "debtor" was not defined in article 2 and the term as used in the footnote would be incompatible with her country's legal rules designed to prevent debtors from evading creditors. Perhaps a word other than "debtor" could be found.

7. Mr. CHOUKRI SBAI (Observer for Morocco) said that the problem was how to prevent the application of the law on collective insolvency to individual consumers, whose debts were often minimal. In his country, collective insolvency only applied to traders or companies. In the case of individuals, recognition would be refused. Small consumers should be excluded from the scope of the law. Perhaps it could be stated that the law did not apply where the debts were predominantly of non-commercial origin, or concerned a non-trader.

8. Mr. BURMAN (United States of America) said that the text could certainly be limited to natural persons residing in the enacting State, in order to prevent major abuses. Wording could also be incorporated to make it clear that the model law referred to debts incurred in commercial transactions. Similar provisions in other UNCITRAL instruments had not led to problems or excessive litigation. UNCITRAL had been established to deal with trade and commerce. It was not concerned with developing laws for consumers or individuals.

9. Mr. GLOSBAND (Observer for the International Bar Association) said that he had to disagree with the United States position. The issue had been discussed during the Working Group sessions, where it had been decided not to include an exclusion for consumer or individual proceedings because of the confusion and the opportunities for mischief that that could cause. The proposed law was intended to provide simple and efficient access for a foreign representative to a proceeding in another State. Apart from a few elements in the definition of "foreign proceeding", it had been decided in the Working Group not to make judgments about the insolvency laws of any particular State. A consumer exception would open the door to litigation in the context of any application filed by a foreign representative where the debtor was not clearly a business entity. Even the adoption of words such as "natural persons residing in the enacting State" would create a possible refuge for anyone who could argue that he was subject to the consumer exclusion. His view was that, if a consumer representative sought recognition in another State, there was an implication that there were insufficient economic or other issues involved to justify that.

10. Mr. ABASCAL (Mexico) said that the issue before the Commission was not new. A number of UNCITRAL texts excluded consumer transactions. There were jurisdictions that distinguished between the law applicable to commercial undertakings and non-commercial law. A State could not be obliged to apply the provisions of the model law to persons not covered by commercial law when that would be contrary to its legal tradition. In his country, for example, commercial law was a matter for the Federal Government and consumer law was in the province of the individual states. With or without a footnote, his country would have to apply the model law exclusively to commercial activities. UNCITRAL's mission concerned trade law. As his country's representative, he had a mandate only to accept provisions coming within the purview of commercial law.

11. Mr. SHANG Ming (China) wondered what the effect of the exception would be on the impact of the model law as a whole. The notion of personal, family or household purposes would be difficult to define. Caution should be exercised in
ensuring that such a provision did not allow debtors to escape their obligations.

12. Mr. MARKUS (Observer for Switzerland) said that, if the Commission decided to have a footnote excluding consumer insolvency, he felt that a formula along the lines read out by the Secretariat should be adopted. Attempts to distinguish between commercial and non-commercial insolvency or to exempt certain debts or creditors from the insolvency would be impracticable.

13. Mr. MAZZONI (Italy) said that he supported the proposed footnote, for the reasons expressed by the observer for Morocco and the representative of Mexico. A potentially universal law could lead to an abandonment of traditional elements of law in each country. While there was uniformity of view on commercial insolvency, there were deep divisions on the issue of civil insolvency.

14. Mr. WIMMER (Germany) said that the proposal to exclude all non-traders would not be acceptable to many delegations. In view of the complicated issues involved, he would be against the exclusion proposed by the representative of the United States. In the unlikely event of recognition of a foreign proceeding being sought in the case of a non-trader, the public policy clause could be used to exclude such a non-trader, and there was no need for the exclusion in a footnote to article 1.

15. Ms. MEAR (United Kingdom) said that, if the footnote was to be included, it would be very helpful for the exclusion to apply only to natural persons residing in the enacting State, for a monetary limit to be imposed, and for the expression “personal or household purposes” to be used. An express reference to “family” might increase the possibilities of abuse. She remained opposed to the footnote.

16. Mr. BERENDS (Observer for the Netherlands) agreed entirely with the remarks of the observer for IBA. When an insolvent trader invested his assets in a personal house in another country, it was right and proper that that house should be included in the insolvency proceeding.

17. Mr. WISITSORA-AT (Thailand) said that cross-border insolvency problems concerned trade and commerce. To make the model law widely acceptable, consideration should be given to the many delegations that wished to exclude consumer insolvency.

18. Mr. SANDOVAL (Chile) said he thought that it had been agreed at the previous meeting that a footnote would be included. He wished to reiterate his support for the proposal of the representative of the United States. The model law concerned international trade. Many delegations had supported the United States proposal, and examples had been cited of previous international instruments in which issues not related to international trade had been excluded.

19. Mr. SUTHERLAND-BROWN (Observer for Canada) thought that the desire of many States to exclude consumer insolvency from the ambit of the model law could best be covered by a note in the Guide to Enactment. He was concerned at the apparent suggestion that States whose legislation did not recognize consumer insolvency would not, as a matter of public policy, recognize foreign representatives coming from jurisdictions that did. That would mean that the public policy of one State would be made applicable to another.

20. The inclusion of a footnote, making the exclusion of consumer insolvency an option, would threaten basic assumptions, as had been pointed out by the observer for IBA. The point should be dealt with in the Guide, and the note in the Guide should limit the reference to natural persons residing in the enacting State.

21. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said that it was recognized by all that consumers were entitled to protection. However, true consumers would not be prejudiced by the law, even enacted as it stood; true consumers were not pursued across borders. He was against any exceptions that could be used by a debtor to delay his creditors. As a practitioner, he had seen many cases of debtors concealing their assets in other countries, where they might not be regarded as traders. He wondered if the footnote should invite States to indicate where any exception for consumer creditors would be stated, in order to assist practitioners from other jurisdictions.

22. Mr. TELL (France) said that he wished to assure the observer for Canada that in most States, even if there was no recognition of consumer insolvency, a judgement of bankruptcy in another country would be recognized. Regarding the remarks of the observer for INSOL, he thought that, in the contemporary world, it could easily happen that a debt might be incurred for personal or household purposes in a foreign country and give rise to a request for recognition of a foreign proceeding.

23. Mr. FRIMAN (Observer for Sweden) said that he would be against a footnote referring to the exclusion of consumer insolvency, for the reasons given by other delegations. He supported the suggestion by the observer for Canada for appropriate wording to be included in the Guide to Enactment, where it could also be stated that a “signpost” of the kind suggested by the observer for INSOL would be useful in the national legislation.

24. Mr. CHOUKRI SBAI (Observer for Morocco) found no major reason to object to the inclusion of a footnote, because the Commission was preparing a model law which was not binding. All countries would be free to adapt and adopt whatever they liked in the Model Legislative Provisions. Furthermore, there was an article that specifically stated that recognition could be refused if it was contrary to public policy. He therefore wondered why the footnote should be refused. He supported the inclusion of the footnote, subject to certain drafting changes to incorporate the various suggestions made in the course of the discussions.

25. Mr. BURMAN (United States of America) thought that the best course might be to allow for further informal consultations. The matter should not be dealt with as a matter of public policy, but should be addressed specifically.

26. Mr. GRIFFITH (Australia) thought that a note in the Guide to Enactment, as suggested by the observer for Canada, might provide a basis for consensus.

27. Mr. AL-NASSER (Saudi Arabia) said that he shared the concern that a debtor should not be allowed to use exceptions in the Model Provisions to delay or escape his creditors. He doubted whether a reference in the Guide to Enactment would serve any useful purpose, and he would be opposed to a footnote, which might encourage differences between the laws enacted by different countries.

28. Mr. KRZYZEWSKI (Poland) supported the views expressed by the observers for Canada and Sweden. In his country, someone might purchase an asset either as an economic entity or as an individual, for his personal use. In the case of individual consumers, guarantees were required automatically, whereas in the case of trading entities a guarantee clause would
have to be included in the contract. It should also be mentioned that trading entities could transfer funds to personal accounts.

29. Ms. SOROKINA (Russian Federation) said that the basic provisions of the model law should be universal in character. If an article contained footnotes or options, there would be no uniformity. In her country, a natural person engaged in trade was registered as a trader. If the trader became insolvent, claims could be made against the enterprise and the individual. A compromise solution might be an explanation in the Guide to Enactment.

30. Ms. UNEL (Observer for Turkey) said that there were differences between the laws in different States, based on public policy. Corporate bodies and natural persons could both be subject to insolvency proceedings under some legislation. All such matters should be left to local law.

31. Ms. MEAR (United Kingdom) agreed with the representative of Australia that, if the issue was to be dealt with at all, it should be in the Guide to Enactment.

32. Mr. MAZZONI (Italy) said that he wished to draw the attention of the Commission to the wording of the preamble, which seemed to him to indicate that the model law applied to the insolvency of traders. In countries such as his, the preamble would be so construed. It referred to matters such as trade and investment, the rescue of financially troubled businesses, and the like. He was therefore not particularly concerned whether or not an exception was included in the text, or in a footnote.

33. Mr. CARDOSO (Brazil) said that, as a compromise, he would favour a reference in the Guide to Enactment.

34. Mr. ABASCAL (Mexico) said that he supported what had been said by the representative of Italy regarding the purpose of the model law as indicated in the preamble.

35. Mr. DOMANICZKI LANIK (Observer for Paraguay) supported the suggestion for a reference in the Guide, and agreed with the view that the model law was not aimed at non-traders.

36. Mr. TELL (France) said he wished to make it clear that it was not proposed to exclude natural persons from the model law in respect of trading debts, or to exclude the liberal professions, farmers or artisans. Nor would the personal property of a debtor be excluded, but only his personal debts.

37. Mr. AL-ZAID (Observer for Kuwait) said that the matter of individual debts or insolvencies should be left to local law in each country.

38. The CHAIRMAN said it appeared that it would be difficult to draft a footnote acceptable to all delegations. He suggested that informal consultations should take place with a view to finding appropriate wording for an explanation in the Guide to Enactment.

The meeting rose at 12.30 p.m.

Summary record of the 622nd meeting

Thursday, 22 May 1997, at 2 p.m.

[A/CN.9/SR.622]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 2.05 p.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (continued) (ACN.9/435)

Article 1 (continued)

1. The CHAIRMAN, pending finalization of the proposed compromise text for the note in the Guide to Enactment on consumer insolvency, invited the Commission to consider paragraph (2) of article 1.

2. Mr. MAZZONI (Italy) said that the issue raised by the representative of Singapore at the 620th meeting was a serious one. Either the model law should leave it to States to indicate which enterprises subject to special regulation would be exempt from the application of the law, or there should be a very strong rationale for specifying types of enterprises to which the exemption applied. The underlying rationale for banks was that a bank crisis exported into another system might expose the enacting State to "systemic" risk. But that rationale only applied to banks. The argument was not as strong for any other enterprise; nor did he see any reason why insurance companies should not be excluded, when other State enterprises or private enterprises serving a public purpose, such as utilities, were not excluded. It should be left to individual States to exclude them.

3. Mr. CHOUKRI-SBAI (Observer for Morocco) supported the text as it stood. In his country, insurance companies were not subject to the ordinary insolvency law. They were supervised by the Treasury. In the event of a financial crisis, the State would liquidate the company, withdraw its operating licence and compensate all those affected. It should also be pointed out that the mention of banks and insurance companies did not constitute an exhaustive list.

4. Mr. YAMAMOTO (Japan) agreed that the model law should not apply to financial institutions. However, he did not understand the reason for the final clause of paragraph (2). There did not seem to be any need for such a restriction; what was important was the fact that the institution was specially regulated. He therefore proposed that the phrase "if the debtor's insolvency in this State is subject to special regulation" should be deleted.

5. Ms. NIKANJAM (Islamic Republic of Iran) said that she was not in favour of paragraph (2) as it was drafted. When local law recognized a debtor as a trader, the law would apply regardless of the nature of the institution. Specific exceptions should not be listed in paragraph (2).

6. Mr. GLOSBAND (Observer for the International Bar Association) said he thought that the intention of the Working Group had not been to make the wording in square brackets limitative. The idea was that entities not governed by the gen-
eral insolvency laws of the country should be excluded from the model law. He therefore proposed that the words "financial services institutions" should be replaced by "persons", that being understood to include corporate bodies.

7. Mr. PEREZ USECHE (Observer for Colombia) said that in his country there were sensitive services, such as utilities, which were specially regulated by the State. He thought that the reference should be to a "person" who, under local law, was subject to special regulation.

8. Ms. UNEL (Observer for Turkey) also thought that reference should be made to local law. There was no need to mention specific exceptions in the paragraph.

9. Mr. CALLAGHAN (United Kingdom) agreed with the revised wording proposed by the observer for IBA. It would be helpful if the Guide to Enactment made it clear that banks and insurance companies were mentioned only as examples.

10. Mr. MARKUS (Observer for Switzerland) recalled what he had said at the 620th meeting. Some countries might wish to apply the model law to banks. Perhaps the text could say simply that the specially regulated entities in question could be excluded from the law.

11. He agreed with the proposal of the observer for IBA concerning the wording in square brackets.

12. Mr. SEKOLEC (International Trade Law Branch) said it might be useful to recall that the provision had originally appeared in article 14, concerning grounds for refusal of recognition. Provision had been made there for non-recognition of insolvencies subject to special regulation, such as those of banks. But it had been argued that what was really needed in the case of banks was more efficient cooperation than provided for in the model law. It had been felt that, where there were special rules on insolvency, those rules should prevail, but it had not been intended that the model law should prevent assistance in inter-bank insolvencies. It had also been felt that the fact that a certain institution could not go bankrupt did not mean that the law should not apply to such institutions; in the case of privatized utilities in a foreign country, assistance might be needed in the enacting State. The Working Group had therefore sought to limit the exclusion to cases where the insolvency proceeding was subject to special rules.

13. Mr. SANDOVAL (Chile) thought that the reference should be to entities subject to special regulation under local law. If banks and insurance companies were mentioned, it would be only as possible examples.

14. Mr. GILL (India) said that he was not in favour of listing the types of institutions to be excluded. That should be a matter for domestic legislation.

15. Mr. TER (Singapore) said that he could accept the suggestions of the observer for IBA and the representative of the United Kingdom.

16. Mr. KRZYZEWSKI (Poland) supported the suggestion made by the observer for Switzerland. The issue of banks was a very important issue. The enacting State should be able to make banks and insurance companies subject to the model law.

17. Mr. SHANG Ming (China) said that to specify types of enterprises that were excluded might not be in line with the practice of some countries. The model law should accommodate differences between the systems in different countries, so as to ensure widespread adoption. Paragraph (2) could simply state that the law was not applicable to entities governed by special regulations within the State concerned.

18. Mr. TELL (France) said that insurance companies were in a similar position to banks in many ways, and banks were subject to special supervision in most countries. He had always understood that the proposed provision referred only to insolvencies of such financial institutions. If publicly owned companies were excluded from the law that could apply to most companies in some countries. However, he agreed that the exclusion could be made optional.

19. Mr. CHOUKRI SBALI (Observer for Morocco) said that banks with mixed public and private ownership would normally be subject to insolvency laws, whereas State banks and other public enterprises were not. He suggested that the text in square brackets should call for the designation of institutions subject to special laws which made insolvency proceedings inapplicable to them.

20. Mr. CALLAGHAN (United Kingdom) said that, in his remarks at the 620th meeting, he had been referring to former State-owned concerns that were now mainly privatized. The State simply made provision to ensure that services were maintained if the company became insolvent.

21. Mr. GLOSBand (Observer for the International Bar Association) said that there seemed to be a predominant view that there should be no fixed list of exclusions and that transparency should be provided for. Regarding the point raised by the observer for Switzerland, he suggested the text should make it clear that the exclusion was optional.

22. Mr. MAZZONI (Italy) suggested that, instead of the text in italics, a rule should be inserted which would read as follows: "The application of this law may be excluded in whole or in part where the debtor's insolvency in this State is subject to special regulation". Examples would then be given in the Guide to Enactment.

23. Mr. HERRMANN (Secretary of the Commission) said that the wording just suggested would not be the traditional wording for a model law, if it was intended that the State, when enacting the law, should decide whether or not to exclude the application of the law to certain entities. A model law was drafted so that it could be enacted as it stood. It would read "This law does not apply...", and then there would be wording in italics addressed to legislators. The intention was presumably not that the law should leave open the decision as to whether its provisions would be applied in a particular case.

24. Mr. MARKUS (Observer for Switzerland) said that his intention was that the enacting State should have the option of excluding the application of the model law when there were special regulations. The matter could perhaps be dealt with in a footnote.

25. Mr. BURMAN (United States of America) agreed with the Secretary's comments. The text in square brackets would require enacting States to list the institutions to be excluded. That was an important element of transparency.

26. Ms. MEAR (United Kingdom) agreed and said that she would prefer to see the provision retained as drafted, with the amendment suggested by the observer for IBA. It was always possible for any State not to implement any provision if it so decided.

27. Mr. SUTHERLAND-BROWN (Observer for Canada) agreed with the Secretary.
28. The CHAIRMAN said that there seemed to a general consensus that the suggestion made by the observer for IBA was acceptable, and that there would be an explanation in the Guide to Enactment. He asked the Secretariat to read out the suggested text.

29. Mr. SEKOLEC (International Trade Law Branch) said that paragraph (2) as amended would read: “This Law does not apply where the debtor is a [insert the designations of specially regulated persons, such as banks and insurance companies], if the debtor’s insolvency in this State is subject to special regulation”.

30. Mr. GLOSSENDI (Observer for the International Bar Association) said that that language did not accommodate the flexibility suggested by the observer for Switzerland. Perhaps the drafting group could take care of that point.

31. The CHAIRMAN said he took it that that was agreed.

32. He invited the Commission to return to the question of the wording to cover the issue of consumer insolvency.

33. Mr. GRiffITH (Australia) said that, following informal consultations, the wording proposed for inclusion in the Guide to Enactment was: “Some States may wish to limit the extent to which this Law applies to non-traders or to natural persons resident in the enacting State whose liabilities were incurred principally for personal or household purposes. Such States may wish to express that restriction in article 1 (as additional paragraph (3)).”

34. The CHAIRMAN said he took it that that wording was agreed. Consideration of article 1 was therefore completed.

Article 2

35. Mr. SEKOLEC (International Trade Law Branch) said that article 2 defined certain expressions that appeared throughout the text. Thus the definition of “foreign proceeding” in subparagraph (a) covered a variety of different proceedings but listed the characteristics that the proceeding must have if it was to be eligible for recognition under the model law, and if the representative of the proceeding, as defined in subparagraph (d), was to be recognized. Subparagraphs (b) and (c) defined foreign main and non-main proceedings, the expression “foreign non-main proceeding” being linked to the notion of “establishment” in the meaning of subparagraph (f). The Commission might wish to consider whether the definition of a foreign non-main proceeding was consistent with article 22(1), which allowed the opening of a proceeding on the basis of the existence of assets in the State. The definition of “establishment” had been taken from the European Union Convention on Insolvency Proceedings, but the concept was a broad one, and it might be necessary to refine the definition to exclude the centre of the debtor’s main interests. The definition of “foreign court” in subparagraph (e) was included for reasons of language economy; in some countries, insolvency might be dealt with by non-judicial authorities, and the term “foreign court” would be understood to include such authorities.

36. Mr. CHOUKRI SBAI (Observer for Morocco) suggested that the definitions should be reordered, with subparagraph (f) following (c), which used the term “establishment”.

37. The CHAIRMAN said that the drafting group would address that issue.

38. Mr. ABASCAL (Mexico) said that he accepted article 2. However, in subparagraph (b), the reference to the centre of the debtor’s main interests was unclear and the criterion would be difficult to apply in practice. He was not objecting to the provision, but if a debtor had establishments in different parts of the world it would be hard for a judge considering an application for recognition of a foreign proceeding to decide where the centre of the debtor’s main interests was.

39. Ms. NIKANJAM (Islamic Republic of Iran) wondered whether the definition of “foreign court” in subparagraph (e) served any purpose. Courts could not be replaced in their functions by other authorities.

40. Mr. SEKOLEC (International Trade Law Branch) said that the reason for having a definition of a foreign court covering non-judicial entities was that without such a definition, if a request came from a non-judicial body, there could be no recognition. The feeling of the Working Group had been that any proceeding that otherwise met the requirements of subparagraph (a) should be covered whether the supervising body was judicial or non-judicial.

41. Mr. WIMMER (Germany), noting the point raised by the Secretariat regarding the definition of “foreign non-main proceeding” in subparagraph (e), thought that the definition should be extended to cover the presence of assets.

42. Mr. WESTBROOK (United States of America) said that any change in the definitions in article 2 might require changes elsewhere in the model law. The Commission should therefore try to avoid changes of substance. He believed that the point raised by the representative of Germany was adequately covered in article 22(1). With regard to the expression “centre of main interests” in subparagraph (b), the term was used in the European Union Convention, and jurisprudence would develop in the European Union which would be helpful elsewhere in the application of the provision. He hoped that no substantive change would be made in article 2.

43. Ms. SABO (Observer for Canada) agreed with the representative of the United States. She wished, however, to suggest three small drafting changes. In order to tie the definitions in subparagraphs (b) and (c) more closely to the definition of “foreign proceeding” in subparagraph (a), the words “means a proceeding” in subparagraphs (b) and (c) might be amended to read “means a foreign proceeding”. In subparagraph (c), the words “other than a foreign main proceeding” could be added after “foreign proceeding” that would make the distinction between a main and a non-main proceeding clearer. In subparagraph (f), a reference to “services” could perhaps be added.

44. Mr. GLOONGY (China) supported the amendments suggested by the observer for Canada to subparagraphs (b) and (c). In subparagraph (d), the words “or to act as a representative of the foreign proceeding” could be deleted, because that was not part of the basic functions of a foreign representative.

45. Mr. BERENDS (Observer for the Netherlands) agreed that article 2 should not be changed, apart from the drafting amendments suggested. The whole model law represented a compromise, and changes in article 2 would affect the entire model law.

46. Mr. AL-ZAID (Observer for Kuwait) said that he supported article 2.

47. Ms. LOIZIDOU (Observer for Cyprus) said that she supported the amendments suggested by the observer for Canada, including the addition of “services” in subparagraph (f).

48. Mr. MARKUS (Observer for Switzerland), supported by Mr. MAZZONI (Italy), supported the amendments to subparagraphs (b) and (c) suggested by the observer for Canada. They clarified the text. He was neutral regarding the inclusion of “services” in subparagraph (f).
49. Mr. Sandoval (Chile) agreed with the view that the article should be approved as it stood, subject to minor drafting changes.

50. Mr. Domanczyk Lanik (Observer for Paraguay) supported the views of the representative of the United States of America on article 2.

51. Mr. Berends (Observer for the Netherlands) said that he doubted whether the addition of "services" in subparagraph (f) was really necessary, but did not have very strong feelings on the issue.

52. Ms. Breluer (France) said that the article was acceptable. She noted that assets were not included in the European Union Convention to the extent that they did not give rise to an independent and permanent economic activity.

53. The Chairman said he took it that the Commission approved the substance of article 2, with the amendments suggested by the observer for Canada. That included the suggestion to insert "or services" at the end of subparagraph (f), which had been supported and to which no strong objection had been raised. Article 2 would be referred to the drafting group.

**Article 3**

54. Mr. Sekolec (International Trade Law Branch) said that a provision similar to article 3 had been included in other UNCITRAL model laws. A special issue that arose concerned the fact that the present model law dealt with issues that were often also covered by international treaties—in particular article 21 on judicial cooperation. Such treaties might have been drawn up to facilitate communication between courts, with procedures to expedite matters through consular agents. In the specific context of cross-border insolvency, that might create obstacles. Article 21 allowed courts, subject to procedural rules, to communicate directly. But if existing treaties could override article 21 its scope would be narrowed. Special care was therefore needed in drafting article 3.

55. Mr. Westbrook (United States of America), supported by Mr. Griffith (Australia), expressed general agreement with the substance of the article. To clarify its meaning, however, he suggested that the text should specify that it applied only when a provision similar to article 21 on judicial cooperation was really necessary, but did not have very strong feelings on the issue.

56. Mr. Maizzoni (Italy) supported the amendment suggested by the representative of the United States of America.

57. Mr. Abascal (Mexico) said that he had no fundamental objection to the amendment proposed by the representative of the United States of America. As drafted, however, it might be understood as severely restricting the principle that international agreements would prevail over the model law. For Mexico, international obligations always took precedence over domestic legislation.

58. Mr. Herrmann (Secretary of the Commission) wondered what the objective aimed at by the representative of the United States of America was. Would the provision apply only in the case of treaties on insolvency matters? Clearly, the treaty referred must deal with matters covered by the model law, as otherwise there could be no conflict, but the suggested wording was unclear.

59. Mr. Westbrook (United States of America) said that the problem was that the quick relief that the model law was intended to facilitate might be obstructed by appeals by parties to treaties which were not directly relevant to the model law but happened to refer to matters such as access to courts, for example.

60. Mr. Markus (Observer for Switzerland) said that he saw no substantive implication in the wording suggested by the representative of the United States of America. The point might be regarded as self-evident, but such an amendment could be accepted.

61. Ms. Meier (United Kingdom) said that, under her country's constitutional law, with the specific exception of European Union law, treaties were not self-executing. She would appreciate a note in the Guide to Enactment to indicate that, for some countries, it might not be necessary to enact the provision in article 3, or it might be necessary to modify the provision. Her concern was that other countries might assume, if her country did not enact article 3, that it was because it did not observe international obligations, which, of course, would not be true.

62. Mr. Choukri Sbai (Observer for Morocco) said that it seemed self-evident that international treaties which had been ratified took precedence over national law. However, problems might arise for some countries if the Commission decided to include such a provision in the model law. The majority view in his country was that international treaties had precedence over domestic law unless there were reservations regarding certain provisions.

63. Ms. Loizidou (Observer for Cyprus) said that, under her Constitution, international treaties took precedence over municipal law. However, she could accept the proposals made by the representatives of the United States of America and the United Kingdom.

64. Mr. Shang Ming (China) said that his view was similar to that of the representative of Mexico. For his country, international treaties prevailed over domestic law unless there were reservations. He therefore supported the present wording of article 3.

65. Mr. Renger (Germany) thought that the proposal of the representative of the United States of America might raise problems. Any qualification of the basic principle that international treaty obligations prevailed over national law would lead to difficulties of interpretation. He would therefore prefer to retain article 3 as drafted.

66. Ms. Nikanjam (Islamic Republic of Iran) thought that, if the model law became part of national law, any conflicts arising between national and international law would be covered by national constitutions. She supported the proposal of the representative of the United Kingdom.

67. Mr. Tell (France) said that, in his country, international treaties in force always prevailed over national law, whatever the subject of the treaty in question. If the text was amended as proposed by the United States representative, the Guide to Enactment could perhaps indicate that in some States, in which international treaties prevailed automatically over domestic law, article 3 would not apply. If the text remained as it stood, it could be interpreted as applying to countries such as his, even though its enactment would not in fact be necessary.

68. Ms. Meier (United Kingdom) suggested that informal consultations should be held to find an acceptable form of words for a note in the Guide to Enactment to meet the particular concerns of different States.

69. Mr. Westbrook (United States of America) supported that suggestion. He was prepared to withdraw his proposal for
an amendment to the text: the suggested note in the Guide could perhaps include the clarification that he had sought.

70. The CHAIRMAN said he took it that the Commission agreed that interested delegations would consult in order to agree on the text of a note in the Guide to Enactment which would explain that States would have the option to include the substance of article 3 in various forms. That being understood, he took it that the Commission wished to adopt article 3 as drafted.

Article 4

71. Mr. SEKOLEC (International Trade Law Branch) said that article 4 referred to two functions that might be performed under the model law, recognition and cooperation. Recognition was covered in article 13 and cooperation in article 21. However, the model law also dealt with other tasks that might be entrusted to courts, such as granting relief on application for recognition or upon recognition. As had been said earlier in the session, the Commission should perhaps review each instance where the model law referred to “the court” to determine whether the reference was to the court specified in article 4 or another court. An alternative would be to expand article 4, calling on States to list courts that might be competent in matters concerning recognition, cooperation and the provision of relief, but differences in national laws might make that difficult.

The meeting rose at 5.05 p.m.

Summary record of the 623rd meeting

Friday, 23 May 1997, at 9.30 a.m.

[A/CN.9/623]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 9.40 a.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (continued) (A/CN.9/435)

Article 6

1. The CHAIRMAN said that, since it seemed from informal discussions that deliberations on article 4 could be expedited if the Commission first dealt with article 6, he would invite the Commission to take up article 6 at the present juncture.

2. Mr. SEKOLEC (International Trade Law Branch) said that article 6 dealt with public policy exceptions. He recalled that the issue of public policy had arisen in the course of discussions on article 14. There had been general agreement that recognition of a foreign proceeding should be subject to the public policy exception to be formulated in the context of article 6. The Working Group’s position had been that any action requested of courts in the enacting State in the context of cross-border insolvency should be subject to public policy. Article 6 was intended to convey that wide concept of public policy. During the discussion of article 14, various views had been expressed on how the concept of public policy should be formulated. The Commission would now have to consider that issue, and any decision made in the context of article 6 would be imported by cross-reference into article 14.

3. Mr. ABASCAL (Mexico) said that there were two different concepts: domestic public policy and international public policy. The latter would be the appropriate concept for the model law, in the interests of its uniform application. In his country, for example, procedural rules were very formal, and a judge might decide that, if the formalities were not complied with in a particular case, that meant that the person affected had not benefited from due legal process and public policy had been violated. The concept of international public policy had enabled Mexican judges to interpret public policy requirements more flexibly in relation to international arbitration, for example. He would not wish to see an application for recognition of a foreign proceeding denied in his country simply because it did not meet the formalities required by domestic public policy. In any case, as he had said at the 608th meeting, during the discussion of article 14, it would be useful for the Model Legislative Provisions to include an article on uniform interpretation. He would propose a text similar to the one that had been adopted in many international conventions, such as the Vienna Sales Convention, as well as the Model Law on Electronic Commerce. The proposed text would read:

“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.”

4. Mr. MARKUS (Observer for Switzerland) thought that it would make no sense to make the whole model law subject to public policy. Once enacted, the model law would become a part of national law, and as such subject to the constitutional law of the enacting State. A clause on public policy was thus an unnecessary provision in a model law, as opposed to a convention or treaty. In any case, the proposed public policy clause was much too broad. A public policy exception would, however, make sense in relation to recognition, and the public policy clause should therefore be integrated in article 14.

5. Mr. CHOUKRI SBAI (Observer for Morocco) considered article 6 to be vital to the model law. Any procedure contrary to the public policy of the State should be excluded. It would be useful to have an explanation in the Guide to Enactment.

6. Secondly, the word “manifestly” should be deleted, because it was superfluous.

7. Mr. WESTBROOK (United States of America) welcomed the proposal of the representative of Mexico. That proposal should be considered at a later stage. As far as article 6 was concerned, it represented a balance. States required some reassurance, but he was confident that public policy would rarely be invoked in practice.

8. Mr. OCHOLA (Kenya) said he did not think that public policy should override statutory provisions, which, in his country, were themselves regarded as the highest expression of public policy. The phrase “manifestly contrary” was not clear.
9. Mr. TELL (France) shared the views of the representative of Switzerland. He could accept the provision in article 6; however, for his country public policy would be a ground for refusing recognition of a proceeding but not for rejection of any other provision. He could accept the present wording, with or without "manifestly", but for his country "public policy" would mean international public policy, under which the application of a foreign law could be refused when such application would contravene fundamental principles of French law. If domestic public policy were applied to foreign decisions, very few such decisions would be recognized in France. The Guide to Enactment should reflect the different views of the meaning of public policy expressed in the Commission.

10. Mr. ODEYEMI (Nigeria) said that public policy was an important legal concept in his country, and that article 6 should therefore be retained, with the deletion of the word "manifestly".

11. Mr. AL-ZAID (Observer for Kuwait) said that article 6 was necessary. In his country, if a matter were against public policy, the judge would reject it. The word "manifestly" should be deleted.

12. Ms. NIKANJAM (Islamic Republic of Iran) shared the views of the representative if France. The Working Group had included the word "manifestly" to limit the scope of the article. Its inclusion, in her view, did no harm.

13. Mr. SHANG Ming (China) supported the retention of article 6 as drafted. He was indifferent as to the inclusion or deletion of the word "manifestly".

14. Mr. PUCCIO (Chile), Mr. CARDOSO (Brazil) and Mr. WISITSONA-AT (Thailand), supported by Mr. DOMANICZKY LANIK (Observer for Paraguay), accepted article 6 as drafted.

15. Mr. GILL (India) said that public policy was important in his country. He would prefer the retention of the article as drafted. He shared the view that "manifestly" was harmless.

16. Mr. SOMDA (Observer for Burkina Faso) said that he accepted article 6 as drafted, except that the term "manifestly" seemed vague, and should be deleted.

17. Mr. ABASCAL (Mexico) said he wished to make it clear that he agreed with the article, but thought that, perhaps in the Guide to Enactment, there should be an explanation of the intended meaning of public policy.

18. The CHAIRMAN said he took it that the article was accepted as drafted. It could be explained in the Guide to Enactment that "public policy" was subject to wide interpretation.

19. Mr. TELL (France) said he did not think that most delegations wished "public policy" to be interpreted broadly. Perhaps the Guide or the report of the Commission could explain that there were two divergent interpretations of "public policy"; a broad interpretation relating it to national law in general and a more restrictive one relating it to fundamental principles of law.

20. Mr. HERRMANN (Secretary of the Commission) said that he did not understand the Commission to have interpreted public policy as a broad concept. The term "public policy" was not new and was well understood. It might not be easy to define, but it concerned what were considered fundamental legal principles. There might be a difference between public policy relating to domestic affairs and public policy in the international sphere. In the Netherlands, for example, arbitration tribunals were required to have an odd number of arbitrators. However, as a matter of "international public policy", enforcement of a foreign arbitration award made by two arbitrators would not for that reason be refused, whereas a Netherlands court might refuse to enforce a foreign award if it were shown that the basic principles of due process had been violated.

21. Mr. ABASCAL (Mexico) welcomed the clarification made by the Secretary. His intention had been to say that "public policy" should be understood not in the sense applied in domestic matters but in the sense of "international public policy". A reference in the Guide and the report might be helpful to ensure that the notion of public policy was not applied in a way that would hinder the recognition of foreign proceedings in the enacting State.

22. Mr. GRIFFITH (Australia) said that the term "public policy" had been used in other UNCITRAL texts and did not seem to need explanation. It might be preferable not to put anything in the Guide.

23. The CHAIRMAN said that the Commission's report would mention the various positions on the meaning of public policy.

Organization of work

24. In response to a point raised by Mr. ABASCAL (Mexico), the CHAIRMAN said that the Commission would need to consider when it should take up the new article on interpretation proposed earlier by the representative of Mexico, if it was decided in principle that such an article should be included.

25. Mr. GRIFFITH (Australia), supported by Mr. SHANG Ming (China), said there was a danger that even a discussion of the proposal in principle at that stage would result in failure to adopt the Model Legislative Provisions during the session. The Commission should first take up the articles that had been considered by the Working Group.

26. Mr. WESTBROOK (United States of America) agreed that the specific provisions of the draft model law before the Commission should be considered first. He hoped that there would be time after that to consider the valuable proposal of the representative of Mexico. A similar provision had been included in many UNCITRAL texts, and it had been found beneficial in court hearings in the United States.

27. The CHAIRMAN said that there seemed to be a strong view that discussion of the proposal for a new article on interpretation should be postponed. He would invite the Commission to resume consideration of article 4.

Article 4 (continued)

28. Mr. OCHOLA (Kenya) said that he was generally in agreement with article 4, but suggested that it should be amended to refer to the recognition of foreign representatives as well as foreign proceedings.

29. Mr. CHOUKRI SBAI (Observer for Morocco) said he supported article 4 in substance, but thought that it was unnecessary to limit the functions referred to as the present text did. The words "relating to recognition of foreign proceedings and cooperation with foreign courts" could be deleted.

30. Mr. RENGER (Germany) said he had doubts concerning the suggested changes. The suggestion made by the observer for Morocco, in particular, would mean a drastic change in the sense of the article.
31. Ms. LOIZIDOU (Observer for Cyprus) said that she could accept article 4 as drafted, but suggested that the title should refer to "competent authorities" in the plural, since more than one authority might be involved.

32. Mr. SUTHERLAND-BROWN (Observer for Canada) supported the suggestion made by the observer for Kenya. Part of the purpose of article 4 was to act as a "signpost".

33. Ms. MEAR (United Kingdom) supported article 4 as it stood. Recognition of the foreign representative was implicit in recognition of the foreign proceeding.

34. Ms. INGRAM (Australia) said that she would prefer the text to be left as drafted. Regarding the suggested mention of foreign representatives, her delegation in fact intended to propose the deletion of the reference to recognition of the foreign representative in article 13. Once a foreign representative had presented his credentials to the court and the foreign proceeding had been recognized, he did not require separate recognition. However, she suggested that the title should refer to the "competent court". The articles on recognition and cooperation referred to courts.

35. Mr. AL-NASSER (Saudi Arabia) said that he shared the view of the representative of the United Kingdom that recognition of a foreign proceeding implied recognition of the foreign representative.

36. Mr. TELL (France) said that if the title were to refer to the "competent court", rather than "competent authority", a corresponding change would need to be made in the body of the text of the article. He thought that the article was intended to allow for the fact that in some countries courts in the strict sense would perform the functions concerned, whereas in others that might be the responsibility of other authorities. He would prefer to keep the title as drafted.

37. Ms. INGRAM (Australia) said that, in that case, the language in article 13 should be aligned.

38. Ms. NIKANJAM (Islamic Republic of Iran) suggested that the expression "competent court or authority" should be used wherever appropriate in other articles, for consistency with article 4.

39. Mr. PEREZ USECHE (Observer for Colombia) said that, to take his country's insolvency laws into account, the reference to an "authority" should be kept.

40. The CHAIRMAN said he took it that the body of the text of article 4 was acceptable as drafted. As to the title, there seemed to be agreement that it should read "Competent court or authority".

41. Mr. SEKOLEC (International Trade Law Branch) asked whether the Commission would wish the title to be placed in square brackets, and consequential changes to be made in the rest of the model law.

42. Mr. RENGER (Germany) thought that it would be a good idea for the title to be in square brackets. The Commission was drafting a model law, not a convention, and the law as enacted in each country would refer to either "court" or "authority", not "court or authority".

43. Ms. SABO (Observer for Canada) thought that problems might arise if all references to "the court" in other articles were replaced by the words "the competent court or authority". Did all references to courts mean the court mentioned in article 4?

44. Mr. WESTBROOK (United States of America) said he thought that the problem was one of drafting, and could be settled on that basis.

45. Mr. GLOSBAND (Observer for the International Bar Association) concurred. It had been the feeling in the Working Group that the court should not be defined too precisely, given the different legal systems. The issue of the use of the term "court" or "authority" might be better explained in the Guide to Enactment.

46. Ms. SABO (Observer for Canada) said that apparent drafting points could affect substance and make the model law less transparent. For example, would "court" be replaced by "court or authority" in article 7, and what would happen in article 8, where the court referred to in the first line seemed to be the court mentioned in article 4, whereas "courts" in the third line was apparently broader?

47. The CHAIRMAN said that further consultations were apparently required to resolve the issues that had arisen in connection with the title of article 4.

**Article 5**

48. Mr. SEKOLEC (International Trade Law Branch) said that the purpose of article 5 was to enable an insolvency administrator appointed in the enacting State to act as representative in a foreign State. The provision was included for the benefit of those States where it was doubtful whether the local insolvency administrator could act abroad.

49. Mr. GLOSBAND (Observer for the International Bar Association), supported by Ms. MEAR (United Kingdom), said that the article had given rise to little discussion in the Working Group sessions. He suggested that it could be adopted.

50. It was so decided.

**Article 7**

51. Mr. SEKOLEC (International Trade Law Branch) said that article 7 was intended to state very simply that the foreign representative could approach the court in another State without any special formalities, such as going through consular channels. It did not deal with the rights of the foreign representative or the competent court. It was simply a matter of access.

52. Mr. GLOSBAND (Observer for the International Bar Association) thought that the article could be adopted.

53. It was so decided.

**Article 8**

54. Mr. SEKOLEC (International Trade Law Branch), introducing article 8, said that in some countries the rules on court jurisdiction were such that, when a foreign applicant approached a local court, that applicant submitted himself or herself to the jurisdiction of the court even for matters not strictly related to the application. If that were the case with the foreign representative in the context of cross-border insolvency, that might deter the foreign representative from approaching the courts, because they might assume jurisdiction over matters over which the foreign representative would not want them to assume jurisdiction. The situation would only arise in certain countries, and some delegations in the Working Group had consequently not seen the need for the article. The Working Group had thought that it would be useful to have the provision, but also that the Guide to Enactment should explain the point.
55. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said that it was not actually clear that any jurisdictions required the foreign representative to submit to the jurisdiction of the court. However, it had been found in the past that neither lawyers nor the courts had been able to assure people that that was not the case. Major reorganizations had been frustrated because of uncertainty about the question of jurisdiction. He believed that the provision was contentious but essential.

56. Mr. CHOUKRI SBAI (Observer for Morocco) thought it was natural that the foreign assets and affairs of the debtor should not be subject to the jurisdiction of the enacting State. However, it was not clear what was meant by saying that the foreign representative was not subject to such jurisdiction. He sought clarification from the Secretariat.

57. Mr. ABASCAL (Mexico) said that he was in agreement with the article. However, it could perhaps be explained in the Guide to Enactment (see document A/CN.9/436, para. 55), that any liability of the foreign representative under the domestic law of the enacting State was not affected.

58. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) drew attention to the words “The sole fact that an application ...”. The provision meant that the foreign representative did not, by the mere fact of making an application, submit himself to the jurisdiction of the court. If subsequently the court made other orders, and the foreign representative acted under them, he would naturally be subject to the jurisdiction of the court in those matters. But he would not, for example, by making the application, render himself liable to an order that all the assets worldwide should be brought within the court’s jurisdiction.

59. The CHAIRMAN said that the matter would be covered by an explanation in the Guide to Enactment.

60. Mr. SEKOLEC (International Trade Law Branch), replying to the point raised by the observer for Morocco, said that if there were grounds for jurisdiction over the foreign representative, for example because he committed an illegal or improper act, that jurisdiction was not set aside by the provision.

61. The CHAIRMAN said he took it that the Commission wished to adopt article 8.

Article 9

62. Mr. SEKOLEC (International Trade Law Branch) said that article 9 recognized the possibility that the foreign representative might have an interest in initiating the opening of local collective insolvency proceedings. The article merely ensured that the foreign representative had standing to make such a request. The fate of that request would be determined by the law of the enacting State. An issue remaining to be decided was whether the foreign representative should have the right to initiate such proceedings immediately or should first apply for recognition of the foreign proceeding.

63. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) explained that the insolvency laws of most countries, in indicating who could commence insolvency proceedings, did not mention representatives of foreign proceedings. Article 9 would give the foreign representative standing. For consistency with decisions already made, that standing should probably commence upon recognition.

64. Mr. SANDOVAL (Chile), supported by Mr. ABASCAL (Mexico) and Mr. GUO JINGYI (China), thought that it should be possible for a foreign representative, subject to the law of the enacting State, to commence a proceeding without waiting for recognition. The words “Upon recognition” appearing in square brackets should be deleted.

65. Mr. TELL (France) said that, under current French law, recognition of a foreign insolvency proceeding would preclude the opening of a local insolvency proceeding in respect of the same assets, but under the model law concurrent foreign and local proceedings were possible. That being so, he did not think that the right of the foreign representative to initiate a local proceeding should be made dependent on recognition. However, the right should perhaps be limited to representatives of foreign main proceedings.

66. He drew attention to the fact that the words “Upon recognition” were omitted in the French version of document A/CN.9/435.

67. Mr. CHOUKRI SBAI (Observer for Morocco) suggested that the words following the word “proceeding” in the title should be deleted.

68. Ms. NIKANJAM (Islamic Republic of Iran), supported by Mr. AL-NASSER (Saudi Arabia), said that she would like to know whether the refusal of recognition would affect the initiation of the local proceeding referred to.

69. Mr. MARKUS (Observer for Switzerland) favoured the words “Upon recognition”, if only to ensure consistency with article 20. The opening of local proceedings should not be encouraged in cases of cross-border insolvency. The suggestion to restrict the possibility to the representative of a foreign main proceeding also made good sense, in the interests of international coordination.

70. Mr. GRANDINO RODAS (Brazil) supported the deletion of the words “Upon recognition”.

71. Mr. NICOLAE VASILE (Observer for Romania) said that the words “est habilite à” in the French version raised questions. Perhaps the word “peut” should be used.

72. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said that the article simply dealt with the right to present an application. All the local procedural rules and tests would be applied, and the local court would not make a liquidation order against a local business simply because of the application from the foreign representative, whether he was recognized or not.

73. Mr. CHOUKRI SBAI (Observer for Morocco) said that under his country’s legislation the foreign representative could only apply for commencement of insolvency proceedings when he had been granted recognition. He suggested that the words “Upon recognition” should be replaced by “After recognition”.

74. Mr. ABASCAL (Mexico), replying to the question raised by the representative of the Islamic Republic of Iran, said that in his country a foreign representative would be able to seek a declaration of insolvency prior to recognition of the foreign proceeding. If the court declared an insolvency, that declaration would stand even if the foreign proceeding were not recognized.

75. The CHAIRMAN said that, although different views had been expressed on the need for the words “Upon recognition”, the prevailing view seemed to be that they should be deleted. He took it that article 9 was adopted with that change. Drafting points would be considered by the drafting group.
Article 10

76. Mr. SEKOLEC (International Trade Law Branch) said that article 10 dealt with a situation where the foreign representative participated in a local insolvency proceeding, whether or not it had been commenced upon his application. The reason for the provision was that local insolvency laws might not mention the foreign representative as being entitled to participate in such proceedings. The provision did not touch on the rules with which the foreign representative would have to comply in participating in the local proceeding.

77. The CHAIRMAN said he took it, in the absence of any observations, that the Commission wished to adopt article 10.

Article 11

78. Mr. SEKOLEC (International Trade Law Branch) said that paragraph (1) established what the Working Group had termed national treatment of creditors, or non-discrimination against foreign creditors. Paragraph (2) made it clear that the principle of non-discrimination did not change local rules on the ranking of claims. However, it added one minimum standard, providing that the foreign creditors admitted to participate in local proceedings should not be placed in the lowest category, and thus be effectively deprived of their rights. If there were special local rules on ranking of foreign creditors, such creditors should not be placed in a category lower than that of general unsecured claims, except in the case of certain types of claims which would have a lower ranking even if they were local claims.

80. The CHAIRMAN said he took it that the Commission wished to adopt article 11.

Article 12

81. Mr. SEKOLEC (International Trade Law Branch) said that article 12 dealt with the obligation to give notice to foreign creditors of collective insolvency proceedings opened in the enacting State. Concern had been expressed that, where national rules provided for publication of notice of the opening of proceedings in an official journal, foreign creditors might not learn of the proceedings. In order to give reasonable protection to foreign creditors, article 12 established the principle that they were to be notified. In principle, they were to be notified individually; however, that might not be justified in the case of small amounts, in view of the cost, and in such cases the court might decide on some other form of notification.

Summary record of the 624th meeting

Tuesday, 13 May 1997, at 2 p.m.

[A/CN.9/SR.624]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 2.10 p.m.
be relied on. The Working Group had decided not to try to provide for a longer period for foreign creditors. There would be difficulties in practice in defining a "foreign creditor".

9. Ms. MEAR (United Kingdom) said that she would have no problem with the amendment proposed by the representative of Mexico. It might well be useful. Regarding paragraph (3)(c), she was happy with the existing text.

10. The CHAIRMAN said that there seemed to be no strong opposition to the Mexican proposal.

11. Mr. TELL (France), after pointing out that the French version of paragraph (1) was not in line with the English version, said that he had certain misgivings about the amendment proposed by the representative of Mexico. Notification of foreign creditors would be subject to domestic law, or in some countries, to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The means of notification varied greatly from country to country. He wondered if it was really necessary to add a paragraph along the lines proposed.

12. Mr. WESTBROOK (United States of America) thought that it would be helpful for some jurisdictions to add the proposed paragraph. It would do no harm to other countries.

13. Ms. UNEL (Observer for Turkey) said that she shared the concern of the representative of France. Many countries were parties to the Convention mentioned by that representative, and there could be conflicts. However, if other delegations found the proposed amendment useful, she would not object.

14. Mr. MARKUS (Observer for Switzerland) said that he too shared the concerns of the representative of France. Both the law of the enacting State and the law of the State where the creditor resided would be relevant.

15. Mr. BERENDS (Observer for the Netherlands) said that he was entirely in agreement with the representative of France.

16. Mr. FRIMAN (Observer for Sweden) said that the proposed paragraph could cause problems in his country, since it was not up to the court to decide how notification should be made; that would be stated in the law. If an amendment was necessary, he would prefer that it should be drafted along the lines of article 13(6), as suggested by the observer for IBA.

17. Mr. CHOUKRI SBAI (Observer for Morocco) supported the views of the representative of France. It was clear from paragraph (1) that notification should be effected in accordance with domestic law.

18. Mr. DOMANICKZY LANIK (Observer for Paraguay) said that he shared the concerns of the representative of France.

19. Mr. PÉREZ USECHE (Observer for Colombia) thought that the means of communication used should be in harmony with the objectives of the law. The proposal made by the representative of Mexico was valuable in that it would give the judge some flexibility in deciding on the most appropriate means of communication.

20. Mr. GLOSBAND (Observer for the International Bar Association) said that he was perfectly satisfied with paragraph (2) as it stood. However, if there was a problem regarding the possible application of formalities, an alternative way to deal with that would be to add at the end of paragraph (2) words such as: "No letters rogatory or other similar formalities are required."

21. Ms. SABO (Observer for Canada) supported that proposal.

22. The CHAIRMAN asked whether that wording would be acceptable as a compromise.

23. Mr. WISITSORA-AT (Thailand) said that he was not wholly in agreement with the proposal. The Commission was considering a model law, and whether letters rogatory or other formalities were required would be a matter for the State where the creditor resided, not for the enacting State. The proposal made by the representative of Mexico might be preferable.

24. Mr. CHOUKRI SBAI (Observer for Morocco) said that he disagreed with the proposal made by the observer for IBA. He believed that the present wording was appropriate, and that the proposed addition would complicate the issue.

25. The CHAIRMAN said that, despite the difference of views, he would take it as the prevailing view that an amendment along the lines proposed was acceptable. On that understanding, he took it that article 12 was adopted.

Article 13 (A/CN.9/435; A/CN.9/XXX/CRP.2, CRP.6, CRP.7)

26. Mr. SEKOLEC (International Trade Law Branch) said that article 13 dealt with the procedure for applying for recognition of foreign proceedings, and matters incidental to that application. The court mentioned in paragraph (1) was the court referred to in article 4. A point to consider was whether the reference to recognition of the foreign representative's appointment was necessary.

27. In paragraph (2), the alternatives in subparagraphs (a) and (b) were intended to accommodate different procedures. Subparagraph (c) was meant to avoid the inadvertent exclusion of any other way of proving the existence of a foreign proceeding.

28. Paragraph (3) distinguished between foreign main and non-main proceedings, in accordance with the definitions agreed upon.

29. Paragraph (4) set out a presumption for determining the centre of the debtor's main interests in the absence of proof to the contrary.

30. Paragraph (5) had been added to facilitate proving that a foreign proceeding met the requirements of article 2(a), and that a foreign representative met those of article 2(d).

31. Paragraph (6) removed the requirement that might exist in some countries for legalization of documents or for similar formalities.

32. Paragraph (7) was drafted flexibly to allow the court to require a translation of documents without compelling it to do so.

33. Paragraph (8) exhorted the court, in view of the urgency of cross-border insolvency cases, to take a decision as quickly as possible.

34. He reminded the Commission that, in considering article 14, it had decided that that article should be rephrased in a positive way instead of focusing on grounds for refusing recognition. In implementing that decision, the drafting group had felt that, subject to any decision on article 13, the two articles would flow better if some material from article 13 could be moved to the new version of article 14, which would be entitled "Decision to recognize a foreign proceeding" (see docu-
ment A/CN.9/XXX/CRP.2). Paragraphs (3), (4) and (8) of article 13 could be moved to the new article 14. He emphasized that no substantive change was intended thereby. It was simply a matter of better presentation of the material in the two articles.

35. Mr. GLOSBAND (Observer for the International Bar Association) said that, following informal consultations, he wished to propose certain changes in article 13.

36. Firstly, it was proposed that the words “and of a foreign representative” in the title should be deleted.

37. In paragraph (1), the phrase “and of the foreign representative’s appointment” would be replaced by “in which the foreign representative has been appointed”.

38. In paragraph (3)(a), to minimize the risks of litigation over the issue of jurisdiction, the following wording would be used: “as a foreign main proceeding if it is taking place in a State where the debtor has the centre of its main interests”.

39. In paragraph (5), the words “a proceeding as defined in” would be replaced by “a proceeding within the meaning of”. Two more proposals, for an amendment to paragraph (2) and for a new paragraph (9), were contained in documents A/CN.9/XXX/CRP.6 and A/CN.9/XXX/CRP.7.

40. Mr. SEKOLEC (International Trade Law Branch) drew attention to the proposed article 25 in the drafting group’s report in document A/CN.9/XXX/CRP.2. The decision on the new subparagraph (d) for article 13 (2) proposed in document A/CN.9/XXX/CRP.7 would have to be taken into account in finalizing the text of the new article 25.

41. Ms. LOIZDOU (Observer for Cyprus) said that all the amendments proposed by the observer for IBA were acceptable. However, she had a problem with paragraph (6), because there seemed to be a contradiction with paragraph (2)(a), which provided that the decision commencing the foreign proceeding should be “duly authenticated”. In her view, the terms “authentication” and “legalization” meant the same. If paragraph (6) could not be deleted, perhaps the phrase “other than that provided in paragraph (2)(a)” could be added.

42. Mr. SEKOLEC (International Trade Law Branch) said that the words “authentication” and “legalization” were intended to refer to two different things. “Authenticated” in paragraph (2)(a) was intended to mean that the decision certified that it emanated from the source indicated. “Legalization” in paragraph (6) referred to procedures whereby consular or other agents stamped documents or otherwise certified that they had seen them.

43. Mr. SEKOLEC (International Trade Law Branch) thought that the title to be retained as in the Working Group’s text (A/CN.9/435). In paragraph (1), “A foreign representative may apply” might be replaced by “An application may be submitted”, because the foreign representative only became a representative after recognition by the court.

44. Mr. SEKOLEC (International Trade Law Branch) thought that the Commission might wish first to decide on the amendment to paragraph (1) introduced by the observer for IBA, based on the understanding that recognition of the foreign representative’s appointment was not a separate act from the recognition of the foreign proceeding but inherent in it. If that amendment was adopted, the wording of the title would be a drafting matter.

45. The CHAIRMAN thought that it was agreed that recognition of the foreign proceeding and recognition of the foreign representative were not separate acts. He took it that paragraph (1) was acceptable to the Commission with the amendment introduced by the observer for IBA.

46. Mr. SEKOLEC (International Trade Law Branch) said that the English title for article 14 proposed by the drafting group (A/CN.9/XXX/CRP.2) was “Decision to recognize a foreign proceeding”. The French version would need to be corrected.

47. Mr. CHOUKRI SBAI (Observer for Morocco) said that he would prefer the reference to the foreign representative in
were still certain formalities that had to be followed, and those might slow the process in a critical case to the point where it was not effective. The issue had been discussed in the Working Group, and paragraph 169 of its report (A/CN.9/435) recorded agreement that the Guide to Enactment would explain that the words “duly authenticated” did not mean that the foreign decision was subject to legalization procedures of the type referred to in paragraph (6). There was no conflict with the Hague Convention. That Convention did not oblige anyone to legalize a document, but set out an efficient procedure if legalization was required. Paragraph (5) was designed to expedite proceedings in cross-border insolvency by avoiding the formalism otherwise required in commercial transactions which did not have the same requirement for speed. The same solution was being adopted in many jurisdictions with regard to electronic communications, where traditional concepts of legalization were impracticable.

57. Mr. TELL (France) said that paragraph (6) would conflict with international and bilateral conventions to which his country was a party. His delegation had always indicated its preference for an international convention, in which case a provision such as that in paragraph (6) might be appropriate. He would not insist on the deletion of the paragraph, but the issue should be mentioned in the report.

58. Mr. KRZYZEWSKI (Poland) supported what had been said by the representative of France. In his country, international conventions ratified by it prevailed over domestic law. He was not sure how the provision could be accepted in countries such as his.

59. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) stressed that the paragraph was important for facilitating rescue of assets. Formalities must be reduced to a minimum. Legalization was a time-consuming process, and did not add anything to the evidence placed before the court in the other jurisdiction. He agreed with the view that authentication of decisions and legalization were different things. In practice, most courts would be satisfied with a certified copy of a court order, and did not require legalized documents. The requirement for legalization would be an impediment striking at the heart of the model law.

60. Mr. DOMANICZYK LANKI (Observer for Paraguay) expressed reservations concerning paragraph (6). Perhaps another way could be found to facilitate the process.

61. Mr. MARKUS (Observer for Switzerland) said that he shared in part the concerns of the representative of France and others. Measures to facilitate the international circulation of documents were welcome, but he wondered if it was appropriate to exclude all legalization from the model law, which was not a convention. There might be cases where a judge could reasonably insist on legalization in order to confirm a particular document which was unfamiliar to him. Perhaps paragraph (6) could be amended to allow the judge, in exceptional circumstances, to require legalization, without prolonging the proceeding. The legalization could be provided subsequently, with the proceedings continuing in the meantime on a provisional basis.

62. Mr. PEREZ USECHE (Observer for Colombia) said that his country’s Constitution provided that in any proceeding no requirements could be imposed beyond those established in the law. What was needed seemed to be a balanced text allowing for a minimum level of legalization, and perhaps it could be stated that, in respect of documents accompanying the application, no requirements could be imposed beyond those established in the law or by applicable international agreements.

63. Mr. AL-NASSER (Saudi Arabia) said that he shared the concerns regarding paragraph (6). It would be very difficult to accept documents which were not authenticated, and the proposed provision would place undue restrictions on the judge.

64. Ms. INGRAM (Australia) said that she was in complete agreement with the representative of the United States and the observer for INSOL. The provision in paragraph (6) was crucial to the model law. The authentication in paragraph (2) should be sufficient for the court to make its decision. Cross-border insolvency should be treated as a special case under national law. She did not see any conflict with the Hague Convention; it would be possible to comply with that Convention and to provide in domestic law for something which went even further in the direction of simplifying procedures.

65. Mr. BERENDS (Observer for the Netherlands) said he thought that “authentication” referred to a stamp by the court showing that the decision was the original decision by the court, while “legalization” was a confirmation by another authority, such as the embassy of the country where the decision was given. He agreed that, in extreme cases, the court should have the power to request legalization, and he therefore supported the suggestion made by the observer for Switzerland. Another possibility would be to require legalization in the context of the granting of relief under article 17, but not for recognition.

66. A decision should also be taken on whether to retain or delete the words “or decisions” in square brackets in paragraph (2)(a).

67. Ms. LOIZIDOU (Observer for Cyprus) said she wished to make it clear that she had no problem with the inclusion of paragraph (6). Her country had ratified the Hague Convention, and she agreed with the view that the provisions of that Convention did not make legalization mandatory. The purpose of her previous intervention had been to point out that authentication and legalization might, in effect, be synonymous. To clarify the matter, a note could be included in the Guide to Enactment on the lines indicated in paragraph 169 of document A/CN.9/435.

68. Mr. CHOUKRI SAIDI (Observer for Morocco) supported the views of the representative of France. The second paragraph of article 13 was sufficient. He supported the deletion of paragraph (6), especially as the Commission was considering a model law and not a convention.

69. Mr. ABASCAL (Mexico) said that he personally thought that legalization was a procedure that need not be time-consuming and could expedite the decision by giving the judge an assurance that documents were authentic. However, he could accept paragraph (6).

70. Mr. SUTHERLAND-BROWN (Observer for Canada) said he shared the view that paragraph (6) would facilitate proceedings. Paragraphs (2)(a) and (6) were not inconsistent. An explanation in the Guide of the difference between authentication and legalization should be sufficient.

71. Mr. GLOSBAND (Observer for the International Bar Association) suggested that, in paragraph (2)(a), the term “authentication” could be replaced by wording referring to certification by the court.

72. The provision proposed in paragraph (6) could be replaced by language such as: "Absent proof to the contrary, the court may presume that documents submitted pursuant to paragraph (2) are authentic, whether or not they have been legalized."
73. Mr. CALLAGHAN (United Kingdom) supported what had been said by the observer for Canada concerning the difference between authentication and legalization. On the requirement for legalization, he endorsed the remarks of the observer for INSOL. To require legalization would be a retrograde step. It would hinder one of the purposes of the model law, which was to enable the foreign representative to take speedy action to secure the assets of the debtor. The suggestion of the observer for IBA for paragraph (6) was a useful one.

74. Mr. RENGER (Germany), referring to the text suggested by the observer for IBA, wondered what the consequence would be if the presumption of the judge proved to be wrong.

75. Mr. GILL (India) said that authentication or legalization was not mandatory in his country. The purpose of the exercise was merely to enhance credibility. To make the cumbersome and time-consuming process of legalization unnecessary, he would prefer to keep paragraph (6) as drafted. In paragraph (2)(a), he would favour a reference to a “certified copy” rather than authentication.

76. Mr. MARKUS (Observer for Switzerland) said that he could accept, as a compromise, the wording proposed by the observer for IBA.

77. Mr. BERENDS (Observer for the Netherlands) supported the suggestion of the observer for IBA.

78. Mr. GRIFFITH (Australia) said that the words “absent proof to the contrary” in the text suggested by the observer for IBA for paragraph (6) seemed unnecessary. However, he would not oppose the suggestion if it provided a way out of the impasse.

79. Mr. DOMANICZKY LANIK (Observer for Paraguay) supported the suggestion.

80. Mr. BURMAN (United States of America), supported by Ms. SABO (Observer for Canada), said that, in the interests of moving on to other important issues, he would join in supporting the IBA proposal.

81. Mr. AL-NASSER (Saudi Arabia) thought that the wording of the IBA proposal needed further consideration as it would leave the authenticity of documents in doubt.

82. Mr. WISITSORA-AT (Thailand) said that he could accept the IBA proposal.

83. Mr. SOMDA (Observer for Burkina Faso) said that the IBA proposal was a good compromise, and he could support it.

84. The CHAIRMAN said he took it that paragraph (2)(a) and paragraph (6) would be amended as proposed by the observer for IBA. The drafting group would refine the language.

85. He asked for views on the words “or decisions” in square brackets in paragraph (2)(a).

86. Mr. GLOSBAND (Observer for the International Bar Association) suggested that they should be deleted.

87. It was so decided.

88. The CHAIRMAN invited views on the new paragraph (2)(d) for article 13 proposed in document A/CN.9/XXX/CPR.7.

89. Ms. SABO (Observer for Canada) said that she was completely in agreement with the proposal. She also recalled the discussion that had taken place at the 619th meeting, in connection with article 22, concerning the addition to article 13(2) of a provision requiring the foreign representative to undertake to inform the court of any changes affecting the foreign proceeding or his appointment. Perhaps that point could be considered along with the proposed new paragraph (2)(d).

90. Mr. TELL (France) supported that suggestion.

91. Mr. WESTBROOK (United States of America) supported the proposed paragraph (2)(d). It would be consistent with the decision taken on article 22. He also supported the suggestion of the observer for Canada. Following informal consultations on the point raised, he wished to propose the following paragraph: “The foreign representative shall inform the court of any substantial change in the status of the foreign proceeding or of the foreign representative’s appointment.”

92. Ms. SABO (Observer for Canada) supported that proposal.

93. Mr. AL-NASSER (Saudi Arabia) suggested that the paragraph should be worded in a more comprehensive way. So as to require the foreign representative to inform the court of any changes affecting the conduct of the foreign proceeding recognized by the court.

94. Mr. SEKOLEC (International Trade Law Branch) said that the Working Group had discussed that idea, and the concern expressed had been that an insolvency proceeding was a very fluid kind of proceeding, and minor technical changes occurred; it would be excessive to require the foreign representative to inform the court of minor technical changes. The idea was to restrict the obligation to matters that would affect the relief or the nature of the recognition granted.

95. The CHAIRMAN said he took it that the United States proposal was adopted.

96. Mr. KOIDE (Japan) said that at the 617th meeting, when the question of termination of recognition had been discussed in the context of article 19(3), it had been agreed that the matter would be considered under article 13. Modification or termination of recognition must be possible if the grounds for granting recognition ceased to exist, such as where the conduct of the foreign representative substantially harmed the interests of the local creditors. He proposed the following new paragraph: “The provisions of articles 13 and 14 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were lacking or have ceased to exist in full or in part.”

97. It should be further explained in the Guide that the procedures by which recognition in the enacting State might be modified or terminated should be those that were available under the procedural rules of the enacting State.

98. Mr. ABASCAL (Mexico) said that nowhere in the model law was there a provision on termination of recognition, and he supported the proposal made by the representative of Japan.

99. Mr. GRIFFITH (Australia) said he was concerned by the argument of the representative of Japan that termination should be possible if the interests of local creditors were harmed; that cut across the basic philosophy of the model law.

100. Mr. WISITSORA-AT (Thailand) supported the proposal of the representative of Japan.

101. Mr. GLOSBAND (Observer for the International Bar Association) said that his understanding was that the text proposed by the representative of Japan was the result of consul-
tions with several delegations. For his part, he found it acceptable.

102. Mr. TEE (Singapore) supported the proposal of the representative of Japan. Without it, the model law would be incomplete.

103. Mr. WESTBROOK (United States of America) supported the proposal. It had been formulated in consultation with several delegations.

104. The CHAIRMAN said that the proposal by the representative of Japan appeared to enjoy wide support. He took it that the Commission wished to adopt it.

105. He drew attention to the amended version of paragraph (3)(a) proposed earlier by the observer for IBA. If he heard no objection, he would take it that the principle was adopted and the text referred to the drafting group.

106. It was so decided.

107. The CHAIRMAN invited comments on paragraph (3)(b).

108. Mr. RENG (Germany) expressed disappointment that the provision excluded any recognition of proceedings relating to assets where there was no "establishment" as defined in article 2.

109. The CHAIRMAN said that the views of the representative of Germany had been noted. He took it that the Commission wished to adopt paragraph (3).

110. No views had been expressed on paragraph (4). If he heard no objection, he would take it that the paragraph was adopted.

111. It was so decided.

112. The CHAIRMAN invited comments on paragraph (5), including the change proposed earlier by the observer for IBA.

113. Ms. SABO (Observer for Canada) thought that paragraph (5) should be moved to article 14, along with other paragraphs as suggested in document A/CN.9/XXX/CRP.2. The matter could perhaps be left to the discretion of the Working Group.

114. The CHAIRMAN said that the views of the representative of Germany had been noted. He took it that the Commission wished to adopt paragraph (5), amended as proposed by the observer for IBA, subject to further refinement by the drafting group.

115. No views had been expressed on paragraphs (7) and (8). If he heard no objection, he would take it that they had been adopted.

116. It was so decided.

117. The CHAIRMAN invited comments on the new paragraph (9) proposed in document A/CN.9/XXX/CRP.6. A note for the Guide to Enactment was proposed in the same document.

118. Ms. NIKANJAM (Islamic Republic of Iran) supported the proposed new paragraph (9). The consequences of recognition should be restricted in the manner proposed.

119. Mr. WESTBROOK (United States of America) said that his delegation had proposed the new paragraph (9) because a number of representatives from civil law countries had indicated that it would be of assistance in the adoption of the law in their countries. Recognition under traditional rules in many countries had a kind of res judicata effect which might prevent, for example, the subsequent opening of a local proceeding. Some delegations had also been concerned that the model law might have some unforeseen legal effects. The provision would make it clear that recognition under the model law would only have the transparent effects set forth in that law.

120. Mr. RENG (Germany) said that he was not convinced of the need for the provision and could not support it. The law was mainly a procedural law, and recognition could hardly be limited to procedural issues.

121. Mr. MARKUS (Observer for Switzerland) said that he fully shared the concerns of the representative of Germany. The provision could be misunderstood.

122. Mr. ABASCAL (Mexico) said that he shared the doubts expressed.

123. Mr. TEE (France) said that, apart from the consequences set forth in the model law, recognition would have effects under the ordinary law of the enacting State. He could not accept the provision for the reasons expressed by previous speakers.

124. Mr. WESTBROOK (United States of America) said that he was happy to withdraw his proposal.

Article 22 (continued) (A/CN.9/XXX/CRP.7)

125. Mr. SEKOLEC (International Trade Law Branch) drew attention to article 22(5) (A/CN.9/XXX/CRP.7), which was related to article 13(2)(d).

126. Mr. GRIFFITH (Australia) said that he had submitted a suggestion to the Secretariat for improving the formulation of article 22(5). However, it was a matter of drafting.

127. Mr. GLOVAND (Observer for the International Bar Association) thought that the substance of article 22(5) could be moved to article 13 and combined with the related provisions adopted earlier. It was a matter that could be left to the drafting group.

Organization of work

128. Mr. GRIFFITH (Australia) recalled that, at the previous meeting, it had been decided to postpone discussion of a proposal by the representative of Mexico for a new article on interpretation. On reflection, he thought that the proposal was an excellent one. He suggested that it should be taken up at the present meeting, along with the proposal of his delegation for a new article 6 (A/CN.9/XXX/CRP.5).

Proposal for a new article 6 (A/CN.9/XXX/CRP.5)

129. Mr. GRIFFITH (Australia) introduced the proposal for a new article 6 in document A/CN.9/XXX/CRP.5. The point made might be self-evident, but an explicit statement might be useful. It would prevent debtors from arguing that relief must be limited to that specified in the present law.

130. Mr. ABASCAL (Mexico) said the Australian proposal was very appropriate and he supported it.

131. The CHAIRMAN said he took it that the Commission wished to adopt the Australian proposal for a new article 6 bis (A/CN.9/XXX/CRP.5).

Proposal for a new article 6 bis (A/CN.9/XXX/CRP.5)
to its international origin and to the need to promote uniformity in its application and the observance of good faith."

133. Ms. BRELIER (France) supported the proposed new article.

Summary record (partial)* of the 627th meeting**
Tuesday, 27 May 1997, at 2 p.m.

[A/CN.9/SR.627]

CROSS-BORDER INSOLVENCY:
DRAFT MODEL LEGISLATIVE PROVISIONS (continued)

Article 19 bis (A/CN.9/435)

1. Mr. SEKOLEC (International Trade Law Branch) said that the actions covered by draft article 19 bis were what were sometimes referred to as "Paulian actions". Such actions, found in many legal systems, were of two types. One type of action was an action by a creditor who wished to undo a transaction by the debtor because the creditor felt disadvantaged. In civil law countries, such actions would be dealt with in civil or commercial courts. They were not intended to be touched on in article 19 bis. It was intended to be limited to actions that were available to an insolveney administrator. The question was whether such actions should also be made available to the foreign representative. The Working Group had discussed the issues at length, and he drew the attention of the Commission to paragraphs 62-66 of document A/CN.9/435.

2. Mr. HARMER (Observer for the International Association of Insolvency Practitioners) said it was generally felt that the utmost assistance should be given to persons appointed by courts. One of the major tasks of the administrator was to restore to the estate the assets that should be there for the creditors. Most laws provided for certain types of transactions to be set aside. The Model Provisions would not, without article 19 bis, give the foreign representative "standing" to attack transactions that sought to place assets out of reach.

3. Mr. GRIFFITH (Australia) supported article 19 bis, subject to some minor amendments which he would introduce. The provision merely concerned the standing of the foreign representative. It did not address any later consequences of his approaching the court. The position taken by the Working Group was succinctly stated in paragraph 63 of document A/CN.9/435. The prevailing view had been that the right to commence Paulian actions was essential to protect the integrity of the debtor's assets, in the interest of all creditors. The provision was intended to relate to the conferring of standing and not to the creation of substantive rights. A similar provision could be found in the 1985 Convention on the Law Applicable to Trusts and on Their Recognition.

4. Article 19 bis should deal only with standing. Of the two alternatives in square brackets, the words "has standing" should be retained instead of "is permitted". The italicized text should be shortened to "(refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors)."

5. Mr. WESTBROOK (United States of America) said that, in the view of the commercial community in his country, the model law should not attempt to address the question of Paulian actions. Such actions were already available, and should be so, in the context of a local proceeding in the enacting State. Paulian actions, although common in many countries, differed widely in their characteristics. Although very important in preventing fraud and ensuring equality of distribution, they also had an enormous capacity to impact on innocent commercial transactions and disrupt commercial life. Often such actions were used to set aside ordinary payments to creditors in circumstances that would normally be considered perfectly proper, but were considered improper because they violated the principle of equality of distribution if they took place in certain periods before bankruptcy. Such time periods could vary widely, and were defined in various ways. The issue was very complex, and simply to award standing did not avoid the problem of complexity. Moreover, such actions were normally brought in the context of an insolvency proceeding, whereas the proposed text did not require that there should be a local proceeding. In many jurisdictions, that would mean that standing would be awarded in a kind of proceeding unknown to local law.

6. In some countries, it was possible to bring an action to avoid certain acts detrimental to creditors outside an insolvency proceeding. The problem that such rights were normally given to creditors, and to put the foreign representative in the same position as creditors would require an entire new structure of doctrine. In short, there was a risk of creating an unpredictable bundle of legal doctrine.

7. The proposals by the representative of Australia would leave the term "standing", which was ambiguous in many systems. The deletion of the words following "detrimental to creditors" would leave open whether the reference was to an action brought in the context of local insolvency proceedings or whether it was intended to give the standing that a creditor had in some jurisdictions to set aside actions detrimental to creditors without there being a local insolvency proceeding. That made the position even worse. It invited a sort of legal chaos. The issue was not a simple matter, and it would be imprudent to attempt to address it at that late stage, when many representatives had left. The United States was strongly opposed to article 19 bis, as originally drafted or as amended.

8. Ms. NIKANJAM (Islamic Republic of Iran) said that the issue was indeed complex and controversial, although it would
be consistent to give the foreign representative rights equivalent to those of the local administrator. As a compromise, she wondered if discussion of the issue could be deferred until a later session of the Commission.

9. Mr. MADRID PARRA (Spain) supported article 19 bis, and expressed a preference for "has standing" rather than "is permitted".

10. Mr. MARKUS (Observer for Switzerland) said that he agreed with the representative of the United States that it was undesirable to complicate matters in the model law. However, the impact of the proposed article would be small, although important. It should be borne in mind that all the procedural and substantive conditions laid down in the enacting State would be left intact. It was simply a matter of ensuring that an action by a foreign representative was not rejected merely on the grounds that he was not a local administrator or other entitled person. It was most important to have such standing guaranteed for the foreign representative, as otherwise assets transferred to a third country might be completely lost to the creditors. He supported the retention of article 19 bis as drafted, with the amendments proposed by the representative of Australia. It would be unwise to make reference to the law of the enacting State, as such an allusion might be understood as a choice-of-law rule. He would prefer the words "has standing", but he could accept the expression "is permitted".

11. Mr. CHOUKRI SBAI (Observer for Morocco) said that, in his country, acts detrimental to creditors could be rendered ineffective both before and after a declaration of insolvency. There were various types of possible proceedings, and the whole matter was complex. He would prefer the retention of the article, but suggested that the phrases "is permitted" and "has standing" should be replaced by "may". The whole of the italicized text in square brackets should be kept; it was vital to make reference to the law of the enacting State.

12. Ms. MANGKLATANAKUL (Thailand) supported the view of the representative of the United States of America that the issue of Paulian actions should not be addressed in the model law, as it was too complicated. In her country, the courts would be reluctant to allow such actions. She would like to see the article deleted.

13. Mr. TER (Singapore) said that he did not support the article, for the reasons given by the representative of the United States of America. In his country, such actions could be initiated, with proper safeguards under the legislation, only by the local administrator following commencement of bankruptcy proceedings.

14. Mr. TELL (France) said that he had no great difficulties with the proposed text. In most jurisdictions, the right to initiate Paulian actions was granted to representatives of creditors as well as the creditors themselves. The effect of the provision would be governed by the law of the enacting State. Compared with the extensive powers granted to the foreign representative under other articles, the scope of article 19 bis would be rather limited. However, the text could perhaps be amended to read: "After recognition of a foreign proceeding, the foreign representative is entitled to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available according to the law of the enacting State in the context of insolvency proceedings in the enacting State]." It was important to refer to the law of the enacting State in order to make clear what law was applicable.

15. Mr. RENGER (Germany) and Mr. BLOMSTRAND (Observer for Sweden) supported article 19 bis, and associated themselves with the remarks of the representative of Australia and the observer for Switzerland.

16. Mr. GRANDINO RODAS (Brazil) said that, for the reasons advanced by the representative of the United States of America, and in the light of his own country's legislation, he would prefer the deletion of article 19 bis.

17. Mr. AL-NASSER (Saudi Arabia) supported the suggestion of the representative of the Islamic Republic of Iran to defer discussion of the article until the next session of the Commission, when there would be time to consider it properly.

18. Mr. KONKKOLA (Finland) considered that the article was important, and should be included in the model law with the amendments proposed by the representative of Australia. The purpose of the article was to indicate that access to justice was not to be denied solely because the plaintiff was a foreign representative.

19. Mr. KOIDE (Japan) said that he had no strong feelings about the article. However, he noted that it did not distinguish between foreign main and non-main proceedings. A proviso on the lines of article 17(3) was needed.

20. Mr. GRIFFITH (Australia) proposed the following compromise text to accommodate the different views: "Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a local insolvency administrator]." He agreed also with the representative of Japan regarding the need for a limitation along the lines of article 17(3) in the case of a foreign non-main proceeding; the wording could be finalized by the drafting group.

21. Mr. WESTBROOK (United States of America) said that, as a matter of principle, he remained opposed to any such provision, but, on the understanding that the provision was to be narrowly understood, as he assumed would be explained in the Guide to Enactment, he could reluctantly accept the proposed text, with an addition to take into account the point raised by the representative of Japan.

22. The CHAIRMAN said he took that it was agreed that article 19 bis would be included in the model law with the wording proposed by the representative of Australia, subject to reference to the drafting group, which would meet again that evening and would incorporate the suggestion made by the representative of Japan.

Report of the drafting group (A/CN.9/XXXCRP.2/Add.1)

23. Mr. SEKOLEC (International Trade Law Branch) drew attention to document A/CN.9/XXXCRP.2/Add.1, which contained the results of the drafting group's attempt to implement the Commission's decisions. The articles had been renumbered. Regarding the title, it was suggested that the text should be called a "Model Law" rather than "Model Legislative Provisions".

24. It was so decided.

25. The CHAIRMAN reminded the Commission that the purpose of reviewing the text was not to reopen the debate but to ensure that the decisions taken were correctly reflected. He invited comments on the text.

26. Mr. GRIFFITH (Australia) commended the excellent work done by the drafting group. He asked why the word "Law" was underlined in some places—for example, in article I—and not in others.
27. Mr. SEKOLEC (International Trade Law Branch) explained that underlining was intended to draw attention to the fact that a change had been made by the drafting group. In the final text, the underlining would be removed.

28. Mr. RENGER (Germany), referring to article 2(6), wondered whether “human means and goods or services” should not read “human means, goods or services”.

29. Mr. SEKOLEC (International Trade Law Branch) said the understanding of the drafting group had been that the reference was to “human means” accompanied by either goods or services.

30. Mr. TELL (France) wondered if article 7 should not be in chapter IV, on cooperation.

31. Mr. SEKOLEC (International Trade Law Branch) said that the thinking of the drafting group had been that the provision was of a general nature, being intended to indicate that, if there were any rights outside the present provisions under other rules in the law of the enacting State giving additional rights, those rights would be available. It had therefore been considered appropriate to place the provision in chapter I.

32. Mr. TELL (France) said that the French version of the chapeau of article 15(2) should read: “Une demande de reconnaissance doit être accompagnée”.

33. Mr. WESTBROOK (United States of America) said that article 18(b) contained the phrase “in respect of the debtor”, whereas in other instances the phrase “regarding the same debtor” had been used. It would be better to align the language.

34. It was so decided.

35. Mr. GLOSBACK (Observer for the International Bar Association) suggested that, in article 20(1), the word “foreign” should be inserted before the expression “main proceeding”.

36. It was so decided.

37. Mr. GRIFFITH (Australia) asked if the article that had formerly been called article 19 bis, and had been adopted earlier in the meeting, would go after article 22.

38. Mr. SEKOLEC (International Trade Law Branch) confirmed that understanding.

39. Mr. HARMER (Observer for the International Association of Insolvency Practitioners), referring to article 28, said he thought that subparagraph (b) should logically be attached to subparagraph (a) and not be a separate subparagraph. The words “recognized in this State as” could be omitted. In the penultimate line of the present subparagraph (c), the word “foreign” should be inserted before the words “main proceeding”.

40. The CHAIRMAN said that the drafting group would consider those points.

41. If he heard no objection, he would take it that, subject to possible further drafting refinements, the text of the Model Law in document A/CN.9/XXX/CRP.2/Add.1, as a whole, was approved as amended.

Other matters

42. Mr. BLOMSTRAND (Observer for Sweden) suggested that the Commission might consider how to monitor the implementation of the Model Law, and might encourage the Secretariat to collect information on its enactment in the various States, perhaps in cooperation with other organizations such as INSOL.

43. Mr. HERRMANN (Secretary of the Commission) said that the Secretariat planned to submit, at a later meeting, a draft decision by which the Commission could adopt the Model Law, following the same practice as with other model laws. That would be accompanied by an expression of appreciation for the contribution made by experts from organizations such as INSOL and IBA. He wished to take that opportunity to thank the experts in question very sincerely for their help in preparing the Model Law and for all their valuable cooperation with the Secretariat. He was confident that the close cooperation with INSOL and IBA would continue during the next stage of the work, including the monitoring of the enactment of the Model Law and the exchange of experience—for example, through the holding of further judicial colloquia.

44. Mr. MADRID PARRA (Spain) said that his delegation wished to propose that, once the Model Law had been adopted, the Commission should extend its work to the preparation of model provisions for international treaties on cooperation and judicial assistance in cross-border insolvency. Such treaties were superior to national law. UNCITRAL should encourage States not only to adopt national laws but also to conclude bilateral and multilateral treaties on the subject.

45. Mr. BURMAN (United States of America) associated himself with the appreciation expressed by the Secretary for the work of INSOL and IBA. He hoped that the Commission would continue to invite non-governmental organizations to participate in its work when appropriate.

46. Mr. NIKANJAM (Islamic Republic of Iran) expressed appreciation for the work of the observers from INSOL and IBA.

47. Mr. WESTBROOK (United States of America) said that a special Commission had been established in his country to consider changes to insolvency law, and it would now take account of the Model Law.

48. Mr. HERRMANN (Secretary of the Commission) suggested that discussion on the proposal of the representative of Spain should be deferred until the next meeting. The Commission should perhaps consider carefully the timing of a decision to prepare model treaty provisions.

The meeting rose at 5.30 p.m.
Summary record (partial)* of the 628th meeting

Wednesday, 28 May 1997, at 9.30 a.m.

[A/CN.9/SR.628]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 9.40 a.m.

CROSS-BORDER INSOLVENCY: DRAFT MODEL LEGISLATIVE PROVISIONS (continued) (A/CN 9/435)

**Future work**

1. The CHAIRMAN said that the Commission should first consider the proposal made by the representative of Spain at the previous meeting concerning the consideration of treaty provisions.

2. Mr. BURMAN (United States of America) said that the proposal should be taken up at an appropriate time, along with discussion of other insolvency issues. Perhaps it could be considered at the next session.

3. Mr. TELL (France) thought that the proposal should be considered along with other proposals for future work.

4. Mr. RENGER (Germany) asked for more time to consider the proposal. However, he did not see the advantage of developing model provisions for bilateral treaties. A bilateral treaty might run counter to the principle that all creditors were to be treated equally.

5. Mr. CHOUKRI SBAI (Observer for Morocco) thought that the Model Law raised various problems in the area of cooperation, in particular. It was a very good law, and constituted an important basis for cooperation in insolvency matters, but it would be useful for it to be converted into a convention. He fully supported the proposal of the representative of Spain.

6. Mr. WESTBROOK (United States of America) noted that there were several projects in the insolvency area to be considered, especially in relation to the banking and finance sector, which had been excluded from the Model Law. Consideration should also be given to a choice-of-law convention, and to procedures and practices relating to the reorganization of enterprises. Consultations would be needed before a decision was taken on future work. He agreed with the representative of Germany that bilateral treaties would not be appropriate for insolvency matters.

7. Ms. ALLEN (United Kingdom) agreed with the representatives of the United States and Germany that there was no need to press ahead with the work suggested by the representative of Spain. The impact of the Model Law should first be assessed.

8. Mr. TELL (France) said that his delegation had maintained, throughout the work of the Working Group, its preference for a convention rather than a model law. What was needed was not model provisions for incorporation in bilateral treaties but, in the medium term, the preparation of a convention. However, a decision in that regard could only be made in the context of UNCITRAL’s work programme.

9. Mr. KONKKOLA (Finland) doubted whether the proposal by the representative of Spain was appropriate for the time being. It might lead to confusion and cause States to delay enactment of the Model Law.

10. Mr. MARKUS (Observer for Switzerland) said that the proposal of the representative of Spain was excellent in principle, but only a multilateral approach would be appropriate. Account should also be taken of the priorities of the future work programme.

11. Mr. LEBEDEV (Russian Federation) said that the idea put forward by the representative of Spain was interesting and useful. The effectiveness of cooperation on cross-border insolvency would depend on international treaties, either bilateral or multilateral. It could be considered in the context of the future work programme. However, a Working Group session on the single issue might not be appropriate at that stage.

12. Mr. HERRMANN (Secretary of the Commission) said that, in discussing future work, the Commission would have to set priorities. There were a number of possibilities for future work in the insolvency area, including the question of the interrelationship between cross-border insolvency proceedings and arbitration proceedings. There might be room for informal consultations on the question of future work. Regarding the Spanish proposal, it would need to be decided whether a draft convention or model provisions for treaties were to be considered.

13. Ms. SANDERSON (Observer for Canada) thought that, in view of the scarcity of resources, the Commission should be careful about embarking on new projects.

14. Mr. BURMAN (United States of America) thought that the issue should be considered at the Commission’s next session. That would allow the Secretariat to receive comments from delegations on topics to be considered. It would also allow consideration of further developments, for example in the European Union or the Organization of American States.

15. Mr. MADRID PARRA (Spain) said that his proposal would not preclude preparation of a convention. The issue of a convention versus model treaty provisions could be resolved in a working group.

16. Mr. AL-ZAID (Observer for Kuwait) said that he had always maintained the advantages of a model law compared with a convention, in view of its flexibility. It would be difficult to convert the Model Law into a convention. If it emerged that there were shortcomings in the Model Law, it could be improved.

17. Mr. SHANG Ming (China) agreed that the newly completed Model Law needed time to be accepted. It would be premature to consider conversion of the provisions into a convention, which many States considered would be inappropriate. There would also be more urgent issues to take up, given resource constraints. Consideration of whether the proposal of the representative of Spain should be addressed should be deferred until the effect of the Model Law had been appraised.

*No summary record was prepared for the rest of the meeting.*
18. Mr. GILL (India) thought that the Model Law needed a chance to be enacted. He supported the view that, in the light of the financial constraints faced by UNCITRAL, a decision on the inclusion of the topic in the work programme should be deferred.

19. Mr. MORI (Japan) shared the view of the representative of China that it would be premature to discuss a binding convention.

20. The CHAIRMAN said that, as he understood the situation, although there was some support in principle for the proposal of the representative of Spain, the general view was that the Model Law was provisional. Perhaps the Secretariat could prepare a draft and then consulted some of the delegations, especially in relation to provisions where different views had been expressed. That, he believed, had proved satisfactory.

22. Mr. HERRMANN (Secretary of the Commission) said that the situation was not new. A final Guide could not be ready at the same session as the adoption of an instrument if it was to contain comments on final changes. In the case of the Model Law on Electronic Commerce, the Commission had requested the Secretariat to prepare a final version of the Guide to Enactment reflecting the deliberations and decisions made at the session. The Commission had mandated the publication of the final version of the Guide to be prepared by the Secretariat together with the text of the Model Law, as a single document. He suggested that the same procedure should be followed in the present case.

23. There was no formal need for the Guide to be adopted by the Commission. If the Commission wished to adopt it, that would have to wait until the next session. In the case of the Model Law on Electronic Commerce, the Secretariat had first prepared a draft and then consulted some of the delegations, especially in relation to provisions where different views had been expressed. That, he believed, had proved satisfactory.

24. Mr. TELL (France) said that important issues had been referred to the Guide. The Guide should appear as soon as possible after publication of the Model Law, but he wanted the right to review its content.

25. Mr. GRIFFITH (Australia) said that he had sympathy with the concerns of the representative of France. However, without a Guide to Enactment, it might appear that the Model Law was provisional. Perhaps the Secretariat could prepare a Guide, and then a successor guide could be approved by the next session of the Commission.

26. Mr. GLOSBAND (Observer for the International Bar Association) agreed that the Guide must be published before the next session of the Commission. The absence of a final Guide might make the Model Law appear more tentative than was actually the case.

27. Mr. RENGER (Germany) suggested, following previous practice, that the Secretariat should liaise closely with delegations which might have strong views on certain elements of the Guide.

28. Ms. NIKANJAM (Islamic Republic of Iran) said that the Guide notes on sensitive points should be reviewed earlier than the next session of the Commission.

29. Mr. ABASCAL (Mexico) agreed that the procedure followed for the Guide to Enactment of the Model Law on Electronic Commerce should be adopted in the present case.

30. Mr. BONELL (Italy) said that he was not aware of any precedent for a body adopting a normative text to adopt an explanatory report at the same time. The adoption of the Model Law should not be delayed and the Secretariat should be allowed to complete the work of publication.

31. Ms. LOIZIDOU (Observer for Cyprus) hoped that the Guide prepared by the Secretariat would be published as soon as possible to assist legislators in the enacting States. Those countries that had comments on the content of the Guide could communicate them to the Secretariat within a specified time.

32. Mr. TELL (France) said that the adoption of the Guide to Enactment was not on the agenda of the present session of the Commission and it had not been possible for his delegation to submit the French version of the draft Guide to its experts for review. The final revision of the Guide should be made available to members of the Commission. All he asked was that his delegation should have an opportunity to make its comments known to the Secretariat prior to publication.

33. Mr. GLOSBAND (Observer for the International Bar Association) expressed the hope that there would be a final version of the Guide available as soon as possible.

34. Mr. CHOUKRI SBAI (Observer for Morocco) would prefer the earliest possible publication of the Guide. It provided explanatory notes and guidance to legislators in drafting legislation. It was quite appropriate to entrust the Secretariat with the preparation of the final text, reflecting the views expressed by delegations. He saw no need for a further session to discuss the issues contained in it.

35. Mr. MADRID PARRA (Spain) shared the concerns expressed by the representative of France. The same procedure as in the case of the Model Law on Electronic Commerce should be followed. On that basis, the task of finalizing the Guide could be entrusted to the Secretariat. The final draft should be made available to delegations in all the languages so that they could rapidly respond with their comments.

36. Mr. MARKUS (Observer for Switzerland) said the Guide should be concluded as soon as possible, otherwise there was a risk that enactment would be delayed by States. The inclusion of certain points in the Guide had been discussed. A draft Guide should be submitted to Governments as soon as possible for comment.

37. Mr. GRIFFITH (Australia) was anxious that the Guide should be issued as soon as possible, and wondered how soon that could be, and whether comments by Governments could be returned within a specified time frame of, say, twenty-one days. Otherwise the Guide should be issued as soon as possible.

38. Mr. BONELL (Italy) said that he had no objection to consultation with Governments, but could not agree to the preparation of a draft in six languages for consideration by all Governments. He was strongly in favour of the adoption and preparation as soon as possible, by the Secretariat, of what had always been a Secretariat paper.

39. Mr. ABASCAL (Mexico) stressed that the Guide was not an official commentary, but just a document to assist implementation. It was not the first time that it had been agreed that the Secretariat should finalize and publish such a Guide.
40. Mr. BURMAN (United States of America) thought that guidance had been given to the Secretariat. Many of the issues that had been discussed at the present session would appear in the report. That would clarify what might appear in the Guide. Those Governments that felt that points in the Guide should be clarified could notify the Secretariat. There was no need for a further draft.

41. Mr. GILL (India) saw the Guide as a mechanism for explaining the aims of the articles to legislators. It was important to have the Guide as soon as possible. The Secretariat could prepare a draft, which would be circulated to Governments for timely comment.

42. The CHAIRMAN took it that the general view was that the preparation of the Guide to Enactment should be entrusted to the Secretariat. The Secretariat would be guided by the Commission's report. There was a precedent for the procedure, and any other procedure would be slow and expensive. In the absence of any objection, he took it that the Commission wished to adopt a recommendation that the Guide should be prepared by the Secretariat, so that both the Model Law and the Guide would be ready for submission to the General Assembly.

43. Mr. HERRMANN (Secretary of the Commission) said that the consultation process requested by the representative of France would be provided for.

The discussion covered in the summary record ended at 11.30 a.m.

Summary record of the 630th meeting*

Friday, 30 May 1997, at 9.30 a.m.

[A/NC.9/SR.630]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 9.45 a.m.

CROSS-BORDER INSOLVENCY:
DRAFT MODEL LEGISLATIVE PROVISIONS (continued)

Adoption of the draft UNCITRAL Model Law and recommendation (A/NC.9/XXX/CRP.9)

1. The CHAIRMAN invited the Secretariat to introduce the draft decision for the adoption of the Model Law on Cross-Border Insolvency.

2. Mr. SEKOLEC (International Trade Law Branch) said it was proposed that the text in document A/NC.9/XXX/CRP.9 should form part of the report of the session. The Model Law on Cross-Border Insolvency would be annexed to the report of the session.

3. The title should be amended to read "Adoption of the UNCITRAL Model Law and recommendation".

4. In the penultimate line of the fourth preambular paragraph in paragraph 1 of the draft decision of the document, after the words "liquidations of debtors' assets and affairs that", the word "are" should be replaced by the words "would be".

5. In operative paragraph 2, the words "together with the Guide to Enactment of the Model Law prepared by the Secretariat" should be inserted after the word "Insolvency".

6. In operative paragraph 3, the words "as to whether" in the second line should be replaced by "to determine whether", and the words "Legislative Provisions" in the fourth and fifth lines should be replaced by "Law".

7. In paragraph 2 of document A/NC.9/XXX/CRP.9, a new sentence should be added to read: "The Commission also expressed its appreciation to Committee J (Insolvency) of the Section on Business Law of the International Bar Association for its active consultative assistance during the preparation of the Model Law."

8. Paragraph 3 should read: "The Commission was also appreciative of the suggestions given to the Secretariat during the preparatory work by the Commission on International Bankruptcy Law of the International Association of Lawyers (Union Internationale des Avocats (UIA))."

9. Mr. GRIFFITH (Australia) commended the outstanding work of INSOL and IBA, and wondered if UIA had made a comparable contribution, such as to deserve a paragraph to itself.

10. Mr. SEKOLEC (International Trade Law Branch) suggested that the paragraphs might be combined. UIA had included the Commission's project on the agenda of its last annual conference and had submitted written comments to the Secretariat; it would also include the item in the agenda of its next conference.

11. The CHAIRMAN said that there should be a reference to UIA, but not in a separate paragraph. Subject to that, he took it that the Commission wished to adopt document A/NC.9/XXX/CRP.9, as revised.

12. It was so decided.

Adoption of the report of the commission (A/NC.9/XXX/CRP.1 and Add.1-15)

13. Mr. TER (Singapore), Rapporteur, introduced the report.

Document A/NC.9/XXX/CRP.1

14. A/NC.9/XXX/CRP.1 was adopted with minor drafting changes.
15. Mr. BURMAN (United States of America) suggested that the words “twentieth session”, in the first sentence of paragraph 4, should be replaced by the words “eighteenth and twentieth sessions”.

16. It was so decided.

17. Mr. GLOSBAND (Observer for the International Bar Association) said that the summary in paragraph 16 seemed unbalanced. Perhaps the second sentence should be deleted, or there should be a mention of the opposing view. He suggested the addition of “Against such consideration, views were expressed that a model law was more flexible and might be considered for adoption sooner than a convention.”

18. Mr. TELL (France) asked whether paragraphs 15 and 16 were intended to summarize the debate that had taken place at the 607th meeting on the choice of instrument.

19. Mr. HERRMANN (Secretary of the Commission) said that the discussion of the form of the instrument at the beginning of the work was dealt with in paragraph 15. Paragraph 16 was intended to address the proposal made to consider the feasibility or desirability of preparing treaty provisions after completion of the model law. He proposed that the second sentence of paragraph 16 should be deleted and a cross-reference inserted to the later discussion on the proposal of the representative of Spain.

20. Mr. TELL (France) said that if paragraph 15 was to faithfully reflect the discussion, it should mention the views of those who preferred a convention. That had been included in the second sentence of paragraph 16, which might be moved to paragraph 15. Although the view had not been adopted, it should be reflected in the report.

21. Mr. MADRID PARRA (Spain) supported the proposal of the representative of France. The minority opinion should be reflected, either in paragraph 16 or in paragraph 15.

22. Mr. CHOUKRI SBAI (Observer for Morocco) thought that the paragraphs accurately reflected the discussion. He saw no reason to add anything. He would prefer to keep the two paragraphs as drafted.

23. Mr. BURMAN (United States of America) said that paragraph 16 might imply that the Commission would later consider the idea of incorporating the Model Law into a treaty regime. It might also be understood that the Commission was intending to do so on the basis of the second sentence, and that reflected a substantive position which the Commission had not yet agreed to. The easiest solution might be that suggested by the representative of France. Alternatively, the proposal of the observer for IBA might be adopted, together with a cross-reference to the later discussion of the proposal of the representative of Spain.

24. The CHAIRMAN said that the proposal by the representative of France seemed to have support.

25. Mr. TELL (France) suggested that the content of the second sentence of paragraph 16 should be reflected in a sentence to be inserted after the first sentence of paragraph 15, describing the minority view. The third sentence would state the decision adopted, and the reasons for it. Paragraph 16 could disappear, or the first sentence could remain with a cross-reference to the proposal of the representative of Spain.

26. Mr. BURMAN (United States of America) asked whether the Secretariat would replace the term “model legislation” or “model legislative provisions” by “Model Law”.

27. Mr. HERRMANN (Secretary of the Commission) said that the terms would be changed where appropriate; that would only be in a few cases, as the decision to use the term “Model Law” was taken at a late stage.

28. In paragraph 15, he suggested that the prevailing view which the Commission had later adopted should be stated first, and then the substance of the second sentence of paragraph 16. The text could then go on to explain that a suggestion had been made that, after completing the work on the model legislative provisions, the Commission should consider the feasibility of preparing model treaty provisions, and there would be a cross-reference to the proposal of the representative of Spain.

29. Mr. TELL (France) said that he could accept that suggestion.

30. The CHAIRMAN said he took it that the Secretary’s suggestion was adopted.

31. Document A/CN.9/XXXX/CRP.1/Add.1 was adopted on that understanding.

32. Mr. GLOSBAND (Observer for the International Bar Association), supported by Mr. CHOUKRI SBAI (Observer for Morocco), suggested that paragraph 9 should mention at the end the prevailing view that the Guide should make it clear that the term “execution” was to be interpreted broadly.

33. It was so decided.

34. Document A/CN.9/XXXX/CRP.1/Add.2, as amended, was adopted.

35. Mr. KOIDE (Japan) said that the first sentence of paragraph 11 incorrectly reflected what had been said by his delegation. He had referred to a notification by the creditor to the debtor demanding payment outside the judicial proceeding, not to automatic stay.

36. Mr. SEKOLEC (International Trade Law Branch) suggested that the words “the automatic stay of actions” should be replaced by “notification of a claim by the creditor to the debtor”.

37. It was so decided.

38. Mr. GLOSBAND (Observer for the International Bar Association), supported by Mr. BURMAN (United States of America), expressed the view that the first sentence of paragraph 2 should be amended to take into account the fact that it did not apply to all legal systems.

39. Mr. HERRMANN (Secretary of the Commission) said that the intention in paragraph 2 had been simply to explain the difference between automatic effects under article 16 and discretionary reliefs under articles 15 and 17. He had understood that there had been a consensus on that.

40. Mr. GLOSBAND (Observer for the International Bar Association) said that his concern was with the last phrase of the first sentence. He wished to make it clear that only certain legal systems might require a court order.

41. The CHAIRMAN said that the Secretariat would draft appropriate language to take that point into account.

42. Mr. GLOSBAND (Observer for the International Bar Association) proposed that, in the third sentence of paragraph 9, the
words "with a view to obtaining a decision to be executed" should be replaced by the words "prior to execution".

43. It was so decided.

44. Mr. BURMAN (United States of America) suggested that there should be a cross-reference in paragraph 5 to the proposal by the representative of Japan, eventually adopted. In paragraph 7, there should be an appropriate cross-reference concerning termination. In paragraph 9, there should be a similar cross-reference. In paragraph 5, there should be an additional sentence reading: "The Commission also noted that a stay under this law would not contravene obligations under the New York Convention."

45. Those suggestions were adopted.

46. Document A/CN.9/XXX/CRP.I/Add.3, as amended, was adopted.

47. Mr. GLOSBAND (Observer for the International Bar Association) said that paragraph 11 did not accurately reflect the discussion. He suggested that the last part of the first sentence should be amended to read: "... effects of the recognition of a foreign non-main proceeding were limited." The second sentence should be deleted. In the third sentence, the words "non-main" should be inserted before "foreign proceeding" and the words "would represent" should be replaced by "might represent".

48. Those suggestions were adopted.

49. Document A/CN.9/XXX/CRP.I/Add.4, as amended, was adopted.

50. Document A/CN.9/XXX/CRP.I/Add.5 was adopted.

51. Mr. KOIDE (Japan) suggested that, in paragraph 11, a cross-reference should be made to the subsequent decision on article 13(9).

52. It was so decided.

53. Document A/CN.9/XXX/CRP.I/Add.6, as amended, was adopted.

54. Mr. GLOSBAND (Observer for the International Bar Association) thought that paragraph 16 did not properly reflect the discussion of the effects of possible termination of a foreign proceeding and how those effects would be dealt with under this law would not contravene obligations under the New York Convention.

55. Mr. SEKOLEC (International Trade Law Branch) said that the intention had been to reflect a proposal by the representative of Italy which had not been adopted.

56. Mr. GLOSBAND (Observer for the International Bar Association) said that he had not intended to eliminate the reference to the views of the representative of Italy; his recollection was that the representative of Italy had argued that the matter should be dealt with under the law of the enacting State, but he had no text to propose to cover it.

57. Mr. TELL (France) said that the view expressed should be reflected. He thought that the paragraph should be retained.

58. The CHAIRMAN said that the proposed amendment by the observer for IBA did not seem to have much support. He took it that it was agreed that paragraph 16 should remain as drafted.

59. Document A/CN.9/XXX/CRP.I/Add.7 was adopted.

60. Mr. BURMAN (United States of America) suggested that paragraph 9 should be amended to better reflect the thrust of the actions of the Commission. The first sentence should be divided into two sentences, the first reading: "General support was expressed for the substance of article 21." There would then be a second sentence beginning: "A view was also expressed ...". In the last sentence, the words "it was stated that" should be replaced by "it was generally agreed that".

61. Mr. TELL (France) said that he could accept the amendments, although he did not understand the need for them.

62. Mr. BURMAN (United States of America) said that the present text implied that, although there had been an agreement, the alternative views had been very prominent. That had not been the case.

63. Ms. NIKANJAM (Islamic Republic of Iran) suggested that mention should be made of her proposal to delete the words "authorization of" in the title, a proposal that had been accepted by the Commission.

64. The CHAIRMAN said that the suggested changes would be made.

65. Document A/CN.9/XXX/CRP.I/Add.8 was adopted on that understanding.

66. Mr. BURMAN (United States of America) suggested that paragraph 4 should be amended to make it clear that the proposal mentioned in paragraph 3 had not been adopted.

67. It was so decided.

68. Mr. TELL (France), referring to paragraph 7, said that the proposal had been to exclude consumers from the scope of application of the Model Law. Rather than speaking of "consumer insolvencies", he suggested that the text should refer to "proceedings concerning consumers".

69. It was so decided.

70. Mr. BURMAN (United States of America), referring to paragraph 11, said that the second part of the first sentence had a different thrust from the proposal mentioned in the Guide to Enactment. He suggested that the text following the words "should indicate that" should be replaced by the substance of the language actually agreed on for inclusion in the Guide at the 622nd meeting, upon the proposal of the representative of Australia.

71. Mr. SEKOLEC (International Trade Law Branch) thought that, to take that suggestion into account, the text might be
amended to read "... the Guide to Enactment should indicate that some States might wish to limit the extent to which the law applied to non-traders or to personal persons residing in the enacting State whose debts were incurred predominantly for personal or household purposes ...".

72. Mr. TELL (France) said that two different views had been expressed in the debate. Some speakers had wished to exclude non-traders from the scope of the provisions, while others had wished to exclude consumers. Consumers and non-traders should be differentiated. There should be a specific reference to the possibility of excluding from the scope of application of the provisions debtors whose debts had been incurred predominantly for personal or household purposes, rather than business purposes.

73. Mr. GRIFFITH (Australia) said that the language he had proposed had been intended to accommodate both the concern about non-traders and the concern about consumers.

74. Mr. CHOUKRI SBAI (Observer for Morocco) said that he would prefer the term "non-traders", which would include consumers.

75. Mr. BURMAN (United States of America) thought that the language originally proposed by the Australian delegation should be kept, but perhaps expanded, both in the Guide to Enactment and in the report, to emphasize the distinction to which the French delegation attached importance.

76. It was so decided.

77. Mr. BURMAN (United States of America), referring to paragraph 12, suggested that the word "would" in the third line should be replaced by "might". Some States would wish the proceedings in question to be recognized abroad, but others not. At the beginning of the third sentence, the words "It was pointed out that" should be replaced by "A view was also expressed that". Regarding the last sentence, he had no recollection that there had been agreement that the approach referred to should be mentioned in the Guide to Enactment. Perhaps the report should state that the suggestion had not been adopted. It had been made, and the matter would be an important issue to be considered at a future working group session. However, the idea should not be reflected in the Guide at that stage.

78. The suggested changes were adopted.

79. Document A/CN.9/XXX/CRP.1/Add.9, as amended, was adopted.

Document A/CN.9/XXX/CRP.1/Add.10

80. Ms. ALLEN (United Kingdom) said that paragraph 11 covered the status of international treaties and their relation to international law. Her understanding was that it had been agreed that the point should be reflected in the Guide to Enactment, and it would be useful for the text to so indicate.

81. It was so decided.

82. Ms. NIKANJAM (Islamic Republic of Iran) said she understood that the Guide to Enactment would state that it might be inappropriate or unnecessary for some States to include article 3 in their legislation, or it might be appropriate for certain States to include it in modified form.

83. Mr. BURMAN (United States of America) thought that a similar reference to that suggested by the representative of the United Kingdom could be added to paragraph 12 also.

84. It was so decided.

85. Ms. LOZIDOU (Observer for Cyprus) suggested that the first sentence of paragraph 11 should be amended to make it clear that, in the countries referred to, treaties were "law" upon ratification but not enforceable without legislation.

86. It was so decided.

87. Mr. TELL (France) asked whether the interpretation in the Guide would be the interpretation of the scope of article 3 given by the United States delegation. Would it say that a treaty or international convention would prevail over a Model Law provision only if it expressly regulated the subject-matter of the provision in question, or would it simply note that a delegation had wished to see article 3 interpreted in that manner? The purpose of the Guide was to interpret the Model Law. France considered that not only a treaty specifically dealing with insolvency might be in conflict with the Model Law, but also treaties on other matters, provided, of course, that there was a sufficient link between the provisions involved.

88. Mr. BURMAN (United States of America) said that he did not disagree with the representative of France. Perhaps language referring to a "sufficient link", coupled with reference to "specific regulation", or some other language indicating a very important connection with what was in the Model Law, would suffice. He agreed that the treaty need not be one specifically dealing with insolvency. However, he thought there had been support for his view that general conventions referring in a general way to matters related loosely to the Model Law should not be used as a basis for refusing application of the provisions of the Model Law. Perhaps the Secretariat could fashion language to accommodate his views and those of the representative of France.

89. Mr. HERRMANN (Secretary of the Commission) said that it would be difficult for the Secretariat, without more guidance, to draft appropriate language on a point on which there were differences of view.

90. Mr. RENGIER (Germany) thought that the Guide to Enactment was intended to be an aid to legislators enacting the Model Law. It should not embark on an academic discussion of possible interpretations.

91. Mr. BURMAN (United States of America) said he did not think that there was a serious difference of views. It was a matter of providing guidance about the intent of the article as relating to treaty provisions that had a substantial relationship to the Model Law.

92. Mr. CHOUKRI SBAI (Observer for Morocco) supported the view of the representative of Germany. The Guide should explain the articles in terms of agreement reached in the Commission. There was no need to refer to conflicting views. The report reflected the views of delegations.

93. Mr. TELL (France) said he did not think that there was any fundamental disagreement. As the United States representative had said, there must be a sufficient link between the treaty provisions appealed to and the Model Law provisions concerned. He agreed that the point should be mentioned in the Guide.

94. The CHAIRMAN said that he took it that there was agreement that the Guide to Enactment would contain an indication along the lines suggested by the representative of France.

95. Document A/CN.9/XXX/CRP.1/Add.10, as amended, was adopted.
Document A/CN.9/XXX/CRP.1/Add.11

96. Mr. GLOSBAND (Observer for the International Bar Association) thought that paragraph 2 should make it clear that States were to designate courts. He proposed that the words “tailor the text of the article to” in the first sentence should be replaced by “designate specific courts according to”.

97. That amendment was adopted.

98. Mr. GLOSBAND (Observer for the International Bar Association), referring to paragraph 3, recalled that it had been decided to place the words “competent court or authority” in square brackets, to indicate that the enacting State would choose the appropriate term. He suggested that paragraph 3 should be amended accordingly.

99. That amendment was adopted.

100. Mr. GLOSBAND (Observer for the International Bar Association) noted that the last sentence of paragraph 8 referred to using the notion of public policy “in a restrictive sense”. There might be confusion over the meaning of “restrictive”, which was ambiguous. He proposed adding the words “so that it would only be invoked in rare cases”.

The meeting rose at 12.30 p.m.

Summary record (partial)* of the 631st meeting

Friday, 30 May 1997, at 2 p.m.

[A/CN.9/SR.63]

Chairman: Mr. BOSSA (Uganda)

The meeting was called to order at 2 p.m.

ADOPTION OF THE REPORT OF
THE COMMISSION (continued)
(A/CN.9/XXX/CRP.1 and Add.1-15)

Document A/CN.9/XXX/CRP.1/Add.11 (continued)

1. The CHAIRMAN recalled the proposal made by the observer for IBA at the previous meeting for an addition to paragraph 8. If he heard no objection, he would take it that that proposal was adopted.

2. It was so decided.

3. Document A/CN.9/XXX/CRP.1/Add.11, as amended, was adopted.

Document A/CN.9/XXX/CRP.1/Add.12

4. Document A/CN.9/XXX/CRP.1/Add.12 was adopted.

Document A/CN.9/XXX/CRP.1/Add.13

5. Mr. BURMAN (United States of America) suggested that, in paragraph 4, for the sake of clarity, it should be indicated that there had been no substantial support for the view expressed. The phrase “The Commission took note” might imply that the Commission agreed with the view.

6. That amendment was adopted.

7. Mr. GLOSBAND (Observer for the International Bar Association) suggested that, in paragraph 8, mention should be made of the fact that the Commission had decided to replace the words “duly authenticated” in paragraph (2)(a) with the words “certified copy”.

8. That amendment was adopted.


Document A/CN.9/XXX/CRP.1/Add.14


Document A/CN.9/XXX/CRP.1/Add.15

11. Mr. BURMAN (United States of America) suggested that, in paragraph 4, the words “and possibly the Organization of American States” should be added at the end of the first sentence.

12. That amendment was adopted.

13. The CHAIRMAN, drawing attention to the reference in paragraph 2 to document A/CN.9/XXX/CRP.9, said he took it that the Commission agreed that the text adopted at the previous meeting should be inserted at that point.


The discussion covered in the summary record ended at 2.15 p.m.

* No summary record was prepared for the rest of the meeting.
IV. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF UNCITRAL:
NOTE BY THE SECRETARIAT (A/CN.9/452)
[Original: English]

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I. General


Reports on activities of international organizations in the field of unification of private law and international trade law including UNCITRAL activities.


Recent instalments:
I in 4:520-523, 1997;

This is a continuation of a series of reports on activities of international organizations (here: UNCITRAL, ICC, OECD) in the field of unification of international trade law. See Bibliography of recent writings related to the work of UNCITRAL (A/CN.9/441) of 4 March 1997 for previous reports.

Parallel title of journal: International business law journal.

Eason-Weinmann Colloquium on International and Comparative Law (4-5 February 1994: New Orleans, La.)


Contribution on work of the UNCITRAL: Uniform law: a bridge too far/M. Evans, p. 145-159.

Ferrari, F. General principles and international uniform commercial law conventions: a study of the 1980 Vienna Sales


Parallel title of journal: Revue de droit uniforme: Institut international pour l’unification du droit privé.


Pubblicazione atti Congresso UNICTRAL. CCI notizie: Camera di Commercio internazionale, Sezione Italiana (Roma) 3:4, 28 marzo 1997.


Schlechtriem, P. Good faith in German law and in international uniform laws. Roma: Centro di studi e ricerche di diritto comparato e straniero; 1997. 21 p. (Saggi, conferenze e seminari/Centro di studi e ricerche di diritto comparato e straniero; 24)


Documents in the CLOUT series are published in all six official languages of the United Nations: Arabic, Chinese, English, French, Russian and Spanish.

Each issue contains abstracts of court decisions and arbitral awards prepared by national correspondents, including bibliographical references to primary sources and scholarly commentaries to the cases.


Copies of the decisions and arbitral awards are available to the public in their original language and can be sent by the UNICTRAL secretariat, against a fee covering the cost of copying and mailing, to interested persons upon request.


A continuation of a series of reports on the work of UNICTRAL; see previous bibliographies of recent writings related to the work of UNICTRAL (A/CON.9/...).


II. International sale of goods


Compares UNIDROIT Principles (1994) with Mexican law and UNICTRAL legal texts, in particular, the United Nations Sales Convention (1980).


See Bibliography of recent writings related to the work of UNCITRAL (A/CN.9/441) of 4 March 1997, p. 9, for contents of the journal.


A note on a court decision rendered by the Federal Court of Justice of Germany. Excerpts of decision, p. 342-345, no. 34.


Also black-letter text of the UNIDROIT Principles in Arabic, Chinese, English, French, German, Italian, Japanese, Portuguese, Russian and Spanish. The complete version of the UNIDROIT Principles is published by UNIDROIT and contains detailed comments on each article and, where appropriate, illustrations.

Mentions the United Nations Sales Convention (1980) and other UNCITRAL legal texts.


In two installments:
I in 2:2:385-395, 1997;

A continuation of previous reports. See previous bibliographies of recent writings related to the work of UNCITRAL (A/CN.9/...).


A continuation of previous reports on recent decisions relevant to the United Nations Sales Convention (1980). See previous bibliographies of recent writings related to the work of UNCITRAL (A/CN.9/...).


The relationship between the Uniform Commercial Code, the German Law of Sales, and the Vienna Convention on Contracts for the International Sale of Goods: A Comparative Study


In Dutch.


The United Nations Sales Convention (1980) is winning the race with national law because the transaction costs of both parties are reduced: Neither party needs to involve itself in foreign law, nor to surround the contract of sales with extensive terms and conditions; the Convention serves as a kind of “safety net.”—English summary [excerpts], p. 906.


Thesis (doctoral)—University of Augsburg, 1996. Includes bibliography and subject index.


Part Three. Annexes

M. CISG: to use, or not to use?


A study of sales of electricity from the point of view of international conventions, including the United Nations Sales Convention (1980).


Also published concurrently in the *International trade and business law journal*—Fn.*


Also published concurrently in the *International trade and business law journal*—Fn.*


Also published concurrently in the *International trade and business law journal*—Fn.*

Also published concurrently in the *International trade and business law journal*—Fn.*


Good faith in German law and in international uniform laws. Roma: Centro di studi e ricerche di diritto comparato e straniero, 1997. 21 p. (Saggi, conferenze e seminari/ Centro di studi e ricerche di diritto comparato e straniero ; 24)


Appendix I: A pictorial comparison of UCC and CISG risk of loss provisions.

Su, Y. X. Die Rechtsmangelhaftung des Verkäufers nach UCC und CISG: eine aktuelle Betrachtung. [In English and French. Includes bibliographical references.]


III. International commercial arbitration and conciliation


See below under Cotran.

Includes bibliography.


An outstanding update bibliography on commercial arbitration, both domestic and international, including references to the work of UNCITRAL in the field.


Reproduced in annex 1 is an unofficial translation of the German Arbitration Act 1989 (Book 10 ZPO) by German Institution of Arbitration (DIS) and German Federal Ministry of Justice, 14 p.

Capatina, O. L'application en Roumanie de la Loi-type et du Règlement d'arbitrage de la CNUDCI. Hague yearbook of international law (The Hague) 9:11-20, 1996.

A paper.

Parallel title of yearbook: Annuaire de La Haye de droit international.


Includes bibliographical references and two appendices.

Appendices: I. Laws of African countries which have adopted the UNCITRAL Model Law: Nigeria, Tunisia, Egypt, Kenya, Zimbabwe —II. List of African countries which have signed or ratified the New York Convention of 1958 (NY), the Convention on the Settlement of Investment Disputes of 1965 (ICISD) and the Convention Establishing the Multilateral Investment Guarantee Agency of 1985 (MIGA).


Concentrates on examining certain key areas where the English Act has borrowed from the UNCITRAL Model Arbitration Law (1985).—p. 101.


The new law was strongly influenced by the UNCITRAL Arbitration Rules (1976).—p. 3.


Herrmann, G. Schiedsregeln der UNCITRAL. Köln: Bundesstelle für Aussenhandelsinformation, 1977. (Bifa- Rechtshilfe. Berichte und Dokumente zum auslän­dischen Wirtschafts- und Steuerrecht ; Nr. 100. Schieds­gerichtsbarkeit)


A commentary to the UNCITRAL Arbitration Rules (1976) in German. Annexes 1-3 reproduce the official text of the Rules in English, French, and Spanish; annex 4, the unofficial text in German.


The author headed the United States delegation during the preparation of the Notes.—Fn. *


International Arbitration Congress (13th: 1996 October 10-12: Seoul)


Series title page: "International Arbitration Conference [sic]., Seoul, 10-12 October 1996".

Includes bibliographical references. Contributions dealing with the work of UNCITRAL: Is there a growing international arbitration culture?
W. Gray, p. 23-30.—UNCITRAL’s basic contribution to the international arbitration culture/G. Herrmann, p. 49-52.—Is there an expanding culture in Nigeria that favours combining arbitration with conciliation or other dispute resolution proceedings/?T. Oyejkule, p. 125-131.


In Czech and English.

Title from caption, p. 3.


The commentary discusses also CLOUT materials up to A/CN.9/SER.C/ABSTRACTS/10 of 16 August 1996.

Includes appendices with source materials, and subject index.

Part I of the Act is almost verbatim adoption of the UNCITRAL Model Arbitration Law (1985), whereas part II incorporates the law regarding enforcement of foreign arbitral awards under the New York (1958) and the Geneva (1927) arbitration conventions.


Title from table of contents/Germany has big plans for its new arbitration act.


Discusses the UNCITRAL-IBA project on monitoring the implementation of the New York Convention (1958) and suggests that UNCITRAL could prepare a publication that might be entitled: Guidelines on the Implementation, Interpretation and Application of the New York Convention.


Title from table of contents: The English Arbitration Act.


Includes tables of cases and legislation, and subject index.


Contains a briefing on the new German Arbitration Act organized by the German Institute for Arbitration (DIS), and a summary of panelists’ discussion thereto.


A reprint of: Asia Pacific law review: City University (Hong Kong).—p. 1.


Title from editorial’s caption.

The new German law on arbitration: commentary and resources [with the contribution and work of M. Grass]. World arbitration and mediation report: covering dispute resolution in the United States and around the world (Yonkers, N.Y.) 9:2:45-55, February 1998.

An analysis of the statute (p. 45-47), and an English language translation of its provisions (p. 47-55). Unofficial translation by the German Institution of Arbitration (DIS) and Federal Ministry of Justice of Germany.


This is the extended and annotated version of the lecture given at the Forum internationale in The Hague on 1 November 1996.—p. i. fn.*


Includes tables of cases and legislation, and subject index.


States that the new English Arbitration Act 1996 (in force 1 January 1997) has philosophical affinity to the UNCITRAL Model Arbitration Law, even where the latter’s language is missing from the new Act.


A paper.

Parallel title of yearbook: Annuaire de La Haye de droit international.

IV. International transport


Parallel title of journal: Revue africaine de droit international et comparé.


Parallel title of journal: Revue africaine de droit international et comparé.

V. International payments


VI. Electronic data interchange


Available also in Arabic, Chinese, French, Russian and Spanish.


Article deals with the UNCITRAL Draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (1995), which is the immediate predecessor of the UNCITRAL Electronic Commerce Law (1996).

VII. Independent guarantees and stand-by letters of credit


This article is based on a lecture given at the Richards Butler Scandinavian Maritime Law Seminar in August 1995—p. 240, fn.*


Partly based on lecture delivered 14 February 1997 at the 1997 Bern Conference on Banking Law (= Berner Bankrechtsag 1997)—p. 717, fn. *


In Dutch.

Markus, A. R. UNO-Konvention über unabhangige Garantien und stand-by letters of credit: die Arbeiten der UNCITRAL zum Thema Bankgarantien. Zürich: Schilttess Polygraphischer Verlag, c1997. 72 p. (Schweizer Schriften zum Bankenrecht; Bd. 46 = Etudes suisses de droit bancaire ; v. 46)


VIII. Procurement


IX. Cross-border insolvency


In Dutch.

Contents: Paragraphs 1-2 describe background and content of the UNCITRAL Model Insolvency Law (1997).—para. 3 gives an appreciation.—para. 4 is about the Model Law in the Dutch context.—Author's letter of 10 October 1997.


Glosband, D. M. UNCITRAL adopts Model Cross-Border Insolvency Law. Bankruptcy court decisions: weekly news and comment (Horpham, Pa.). In three instalments:

II in 30:23:A5-A6, A14, 1 July 1997;
III in 30:24:A7-A9, 8 July 1997.

Titles of instalments: I, UNCITRAL adopts Model Cross-Border Insolvency Law.—II-III. UNCITRAL's new Model Cross-Border Insolvency Law explained.


Reproduces three keynote addresses from the opening session of the Colloquium. See International insolvency review 4:9-35, 1995 (Special conference issue) for the edited transcription of the proceedings.—p. S49, fn.*


Reprint.

In German.

Includes summary in English, French, German on facing columns, p. 15.

Parallel titles of journal: Swiss review of business law = Revue suisse de droit des affaires.


A summary of the discussions at a panel that convened 20 November 1997 at the Bankruptcy Court in the Southern District of New York.—p. 1.


X. Privately financed infrastructure projects


A brief account both in English and Spanish. Parallel title of journal: Noticias.

ANNEX

UNCITRAL LEGAL TEXTS

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#### 1. General series

- **A/CN.9/430**: Provisional agenda, annotations thereto and scheduling of meetings of the thirtieth session
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- **A/CN.9/436**: Draft Guide to enactment of the UNCITRAL Model Legislative Provisions on Cross-Border Insolvency: note by the Secretariat
  - Part two, I, E
- **A/CN.9/437**: Report of the Working Group on Electronic Commerce on the work of its thirty-first session
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- **A/CN.9/438** and Add.1-3: Privately-financed infrastructure projects: Draft chapters of a legislative guide on privately-financed infrastructure projects
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- **A/CN.9/439**: Training and Technical Assistance: note by the Secretariat
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#### 2. Restricted series

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- **A/CN.9/XXX/CRP.3**: Consideration of the UNCITRAL Model Legislative Provisions on Cross-Border Insolvency: proposal by
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#### B. List of documents before the Working Group on Insolvency Law at its twentieth session

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   A/CN.9/WG.V/WP.46  
   Working paper submitted to the Working Group on Insolvency Law at its twentieth session: revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency  
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   A/CN.9/WG.V/XX/CRP.1 and Add.1-14  
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   A/CN.9/WG.V/XX/CRP.2 and Add.1  
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   A/CN.9/WG.V/XX/CRP.3  
   Special article for provisional relief at the request of a foreign representative appointed on an interim basis  
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- A/CN.9/WG.IV/WP.70 | Provisional agenda | Not reproduced |

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- A/CN.9/WG.V/XXI/CRP.1 and Add 1-12 | Draft report of the Working Group on Electronic Commerce | Not reproduced |

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